STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL COLEMAN, Charging Party, v. SANTA CLARA VALLEY WATER DISTRICT, Respondent.	Case No. SF-CE-663-M PERB Decision No. 2349-M December 19, 2013

Appearances: Gattey and Baranic by Jason L. Aldrich, Attorney, for Michael Coleman; Meyers Nave by Samantha W. Zutler, Attorney, and Brian C. Hopper, Assistant District Counsel, for Santa Clara Valley Water District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Michael Coleman (Coleman) to a proposed decision (attached) of a PERB administrative law judge (ALJ) dismissing the complaint, and underlying unfair practice charge, against the Santa Clara Valley Water District (District).

The complaint alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] sections 3502.1, 3506 and 3509(b), and PERB Regulation 32603(a) and (g)[2] by denying Coleman's request for reclassification from a Planner II to a Senior Planner position.

We have reviewed the entire record, including the charge and first amended charge, the complaint and amended complaint, the transcript of the hearing before the ALJ and exhibits,

[1] The MMBA is codified at Government Code section 3500. Unless otherwise noted, all statutory references are to the Government Code.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the parties' post-hearing briefs, the ALJ's proposed decision, Coleman's exceptions to the proposed decision, and the District's response thereto. Based on our review, we find the proposed decision to be well-reasoned and in accordance with applicable law and adopt it as the decision of the Board itself, as supplemented by the discussion below.

PROCEDURAL HISTORY

Coleman filed the present charge on June 4, 2009, against the District. On April 30, 2010, PERB's Office of the General Counsel issued a complaint alleging that the District violated sections 3502.1, 3506 and 3509(b) of the MMBA, and PERB Regulation 32603(a) and (g) by denying Coleman's request for reclassification.

On May 19, 2010, the District answered the complaint by denying any violation of the MMBA or PERB Regulation and asserted as an affirmative defense that the charge was untimely. On July 28, 2010, the parties met for an informal settlement conference but failed to resolve their dispute and the matter was scheduled for a formal hearing before an ALJ.

On February 7, 2011, the first day of hearing, Coleman requested an amendment to paragraph three of the complaint to state:

> [C]ommencing in 2005 and continuing through November 2008, Charging Party exercised rights guaranteed by the MMBA by serving as a negotiator, employee representative, and elected official of the exclusive representative for his bargaining unit, Employees Association AFSCME Local 101.

The District requested additional time to prepare for the hearing and the ALJ granted both the request to amend the complaint and the request to continue the hearing.

The hearing resumed on March 21, 2011, at which time Coleman requested a further amendment to the complaint to allege a second adverse action by the District consisting of its alleged failure to remove Coleman's out-of-classification duties for several months after it

denied his request for reclassification and Coleman's appeal thereof through the Employees Association, AFSCME Local 101's (EA) grievance procedure. The ALJ denied this request.

After two additional days of hearing, on March 22 and 23, 2011, the parties filed post-hearing briefs and the matter was submitted for proposed decision on May 31, 2011. The ALJ issued his proposed decision on January 13, 2012.

FACTUAL BACKGROUND

The material facts are largely as set forth in the proposed decision and we summarize here only those that are essential to this decision.

The District consists of four divisions: Watershed Operations, Water Utility Enterprise, Capital Program Services (CPSD), and Administration. As of 2008, the CSPD was headed by Chief Operating Officer Nai Hsueh (Hsueh), Dave Chesterman (Chesterman) was the CPSD's Deputy Operating Officer, and Katherine Oven (Oven) was one of two Assistant Operating Officers in the CPSD. Within CPSD is the Environmental Planning Unit (EPU), which was managed by Debra Caldon (Caldon). The EPU contained several employees working in the Planner series, including one Senior Planner, Dave Dunlap (Dunlap), and five to six Environmental Planner IIs, including Coleman.

The Planner series, which was approved and adopted in March 2005, includes both Senior Planners and Planners I and II. While the Planner II is a higher level classification than the Planner I, the distinguishing characteristics between a Planner II and a Senior Planner are part of the underlying dispute giving rise to this charge. The District's class specification documents indicate that, while Planner IIs are to perform "complex and difficult environmental planning work," and "[m]ay exercise occasional technical and functional supervision over professional staff," Senior Planners "lead, oversee, and participate in the more complex and difficult work of staff related to environmental planning issues," and specifically, "[e]xercise[]

function and/or technical supervision over lower level staff, including but not limited to environmental planners and consultants," and "[l]ead, plan, train and review the work of staff responsible for performing professional environmental planning work." According to various witnesses, the District has interpreted these provisions as requiring that, to justify the title of Senior Planner, an employee must routinely perform not only the complex and technically difficult work characteristic of Planner IIs, but must also exercise "lead" or supervisory functions over other staff.

However, the District's practice has not always conformed to the written provisions of the class specification documents. While Dunlap, who was hired in 2005 as the first Senior Planner in CPSD, performed lead functions over other planners, since that time, at least two other employees, Bill Smith (Smith) and Terry Neudorf (Neudorf), have worked as Senior Planners in the District's Watershed Operations and Water Utility Operations divisions, respectively, without performing "lead" or supervisory duties.

Coleman began his employment with the District in July 2002 as a Planner II. At all times material to this charge, his duties have included managing environmental clearances for projects managed by the CPSD, including the Alviso Slough Restoration Project. In March 2006, at the request of Coleman's supervisor Caldon, Hsueh and Chesterman approved a temporary appointment for Coleman as Project Manager for the Alviso Slough Restoration Project. The appointment involved a pay increase to two steps above Coleman's Planner II salary. Under the provisions of the memorandum of understanding (MOU) covering Coleman's classification, he would remain in the bargaining unit while carrying out the temporary assignment as Project Manager and the appointment was limited to one year, with no more than a one-year extension, as necessary. During his temporary appointment, Coleman continued to report to Caldon but also reported to, among others, Oven on the Alviso Slough

Project. In March 2007, Hsueh and Chesterman renewed Coleman's temporary appointment, as work on the Alviso Slough Project continued.

As suggested above, the Planner series belonged to a bargaining unit exclusively represented by EA. Coleman joined the EA when he began working for the District and in 2004-2005 formed a subcommittee within the EA to represent the interests of professional and scientific employees in the bargaining unit. Coleman was one of seven members of the EA's bargaining team during 2005-2006 negotiations with the District for a MOU, and then served on a joint labor-management committee created by the MOU for dealing with classification issues. Coleman also served as the EA's Vice President of Outreach from December 2006 to December 2008.

Coleman gained some amount of respect and even admiration for his involvement with EA from some of the District's officials, including CPSD Assistant Operating Officer Mike Hamer, who sat across the table from Coleman during negotiations for the MOU, and District Human Resources (HR) Classification and Compensation Unit (CCU) Program Administrator Frank David (David), who worked with Coleman on the joint labor-management classification committee. He, however, occasionally encountered friction with other District officials in the context of his activity on behalf of EA. In March 2007, Coleman discovered that his division, CPSD, was issuing a Request for Proposals (RFP) for the District to contract with private consultants to perform the same duties as performed by bargaining unit planners. On March 13, 2007, EA Local President Glenna Brambill (Brambill) requested an informal meeting with the District to discuss a potential grievance. In attendance were Brambill and Coleman for the EA, and District Human Resources Officer Alan Triplett and Chesterman for the District and CPSD. At the meeting Coleman and Chesterman took opposing positions on the proposal to contract out planner work and the meeting ended with Chesterman determined

to proceed with the RFP. Coleman drafted a formal grievance, alleging that Chesterman and Oven had violated notice provisions. The record is unclear whether the grievance was ever filed. However, the District later rescinded its plans to accept bids on the RFP and award a contract for planner services to non-bargaining unit consultants.

In January 2008, Caldon sent a survey to other District officials regarding the performance of project managers under Caldon's supervision. Oven returned the survey with a "needs improvement" rating for Coleman in almost every category, whereas Caldon had consistently rated Coleman's performance as "exceeds expectations." Oven's criticisms of Coleman included such matters as his alleged grammatical mistakes, poor writing skills, poor preparation of environmental review reports and his alleged penchant for requesting compensatory time off when he was needed to work overtime.

On May 6, 2008, Coleman made a formal request with the District's Equal Opportunity Program for administrative reassignment so that he would not be subject to what he alleged were Oven's mistreatment and unfair evaluation of him.

Also in the spring of 2008, pursuant to a process in the MOU which Coleman helped negotiate, Coleman filed a request for a classification study to be conducted to determine whether a reclassification of his position, from Planner II to Senior Planner, was warranted. Although there was evidence that the process could be initiated by an employee, a middle manager, a bargaining unit representative, or an appointing authority, the ALJ found that petitions for reclassification were rarely used by a manager or the appointing authority to downgrade a position to a lower classification.

On June 9, 2008, Caldon completed a position description questionnaire, which was supportive of Coleman's reclassification request, but which effectively admitted some doubt about whether Coleman was working out-of-class under the District's class specification

documents. Specifically, Caldon stated her belief that "the current classification scheme does not well-describe any of the [Planners] or [Senior Planners] duties so probably all of my staff are working [out of] class." Further, she stated her view that Coleman's duties aligned most closely in complexity with those of the Senior Planner position, but that he "does not formally serve as a technical lead or in a supervisory capacity."

Coleman's request and the position description questionnaires prepared by Coleman and Caldon were forwarded to the District's CCU. Typically, CCU's David was involved at the initial stage of the reclassification request process to determine whether a study is warranted. However, because of Coleman's good working relationship with David, the District's Human Resources Deputy Administrative Officer Jose Peralez (Peralez) chose to hire an outside consultant to conduct the study and avoid any appearance of a conflict of interest. The District is not bound to accept the findings or recommendations of the study.

The District retained former District employee Richard Estevez (Estevez) to conduct the study. Estevez interviewed Coleman and Caldon and submitted his report to David on July 18, 2008. The report recommended that Coleman be reclassified, though it did not directly address the issue alluded to by Caldon of whether Coleman's duties required him to act in a supervisory capacity over other planners.

The report next went to Hsueh, who made several handwritten comments in the margins of the report taking issue with its accuracy and whether Coleman exercised technical supervision over the Planner II position, as stated in the job description for the Senior Planner classification. The parties dispute whether Hsueh specifically ordered that the report be rewritten to arrive at a different conclusion. There was conflicting evidence on this point. David testified that he and his supervisor, Angelica Cruz (Cruz), met with Hsueh, who expressed "her disagreement with all the consultant's conclusions," and that Cruz "took that as

a directive" from Hsueh to rewrite the report to reflect Hsueh's views. David testified that he did not share Cruz's interpretation of their meeting with Hsueh, and that he did not believe that Hsueh had specifically instructed him and Cruz to have Estevez rewrite the report to reach a different conclusion. However, based on the meeting with Hsueh and on a meeting with the District's Chief Administrative Officer (CAO) Sharon Judkins (Judkins) that occurred at about the same time, David understood that he and Cruz were to develop a series of questions to guide further "fact-finding" by Estevez to address Hsueh's concerns.

Regardless of whether Hsueh specifically ordered that the report reach a different conclusion, there is no real dispute that, as a result of her intervention, Judkins directed David to meet with Estevez and have him conduct "follow-up fact-finding" aimed specifically at addressing Hsueh's concerns. After interviewing Hsueh and Caldon, David typed Hsueh's comments, along with his own notations of where he agreed and disagreed with Hsueh. There was no evidence that Hsueh was aware of Coleman's protected activities at the time she reviewed and commented on the report.

On August 15, 2008, Estevez interviewed Coleman again and prepared a second report with additional details regarding Coleman's duties. Unlike the first report, Estevez's second report noted the apparent discrepancy between the District class specification documents for the Senior Planner and Coleman's actual duties, and in particular the absence of duties requiring Coleman to serve in a lead capacity over other planners. Based on this additional information, Estevez issued his second report determining that Coleman was appropriately classified as a Planner II, rather than a Senior Planner. Apparently bothered by Hsueh's intervention in the process, Peralez ordered that the second report not be distributed and David testified that, in fact, it was not forwarded to Hsueh, or to Judkins, who was to be the ultimate decision maker in the process. Peralez did, however, include Judkins on an email message in

which he stated his view that the process should remain "objective" and not involve re-writing the report based on disputed facts about the incumbent's duties.

On August 28, 2008, David sent Peralez and Judkins Estevez's original report, notwithstanding Hsueh's reservations, along with David's recommendation that it be adopted and that Coleman be reclassified. Judkins testified that she did not review the full report at this time but relied instead on conversations with Hsueh and on Hsueh's written comments, as well as David's summary of Estevez's initial report. Based on the information from these sources, Judkins decided to deny Coleman's request for reclassification.

Because Judkins had assumed the position of CAO in April 2008, Coleman's reclassification request was among the first such requests she reviewed. Her stated preference, born out by statistics presented at the hearing, was to deny requests for reclassification whenever possible, and to reassign any out-of-class duties to other personnel. In fact, she granted only two of the first 20 such requests she reviewed. Coleman's was among those denied. No evidence was presented that Judkins knew of any of Coleman's protected activity at the time of her initial decision to deny his request for reclassification.

After issuing her denial, she met with David and Peralez and directed them to work with Estevez to identify any out-of-class duties being performed by Coleman and to have them removed. Judkins did not, however, follow up on her directive. Nor did Judkins inquire about reclassifying Smith and Neudorf downward to Planner IIs, although Judkins admitted that she became aware during her consideration of Coleman's request that at least some Senior Planners in the District were, like Coleman, not acting in a supervisory capacity as part of their regular duties.

Although Judkins had apparently decided as early as September 2008, to deny Coleman's reclassification, it was not until November 7, 2008, that Coleman learned of the

decision. Two days later, Coleman sent an email message to David, Chesterman and Judkins stating that he would pursue the appeals process, which is initiated at the third step of the EA's grievance process. Coleman considered the decision an act of retaliation by Hsueh because she did not like Caldon, who was Coleman's boss. He also requested that he be immediately relieved of all work on the Alviso Slough Restoration Project, but Chesterman informed Coleman that he would not be reassigned until after his appeal had been resolved.

On December 2, 2008, Coleman filed his appeal, in which he claimed retaliation based on Chesterman's and Oven's hostility towards Caldon and towards Coleman for his involvement in protected conduct. At this point, Judkins was made aware of Coleman's involvement with the EA by virtue of her role in reviewing Coleman's grievance appealing her previous denial of his request for reclassification. After meeting with Coleman and his EA representative as part of the appeals procedure, on January 18, 2009, Judkins issued her final decision to deny the request for reclassification and the grievance appealing such denial. Judkins testified that, whereas previously she had relied primarily on the summary report from HR staff and her conversations with Hsueh for her initial decision, she reviewed all of the documentation associated with Coleman's request but did not talk to Hsueh, Chesterman or Oven about the matter during the appeal stage.

Coleman sought to have the grievance proceed to arbitration. Although the EA appealed the grievance to arbitration to preserve the timelines, it informed Coleman in March 2009, that it would not finance the costs of arbitration and that Coleman would therefore have to cover all litigation costs himself. Coleman chose not to pursue arbitration.

Consistent with Chesterman's instructions to continue his regular duties, Coleman continued working on the Alviso Slough Project, pending the outcome of his appeal. In fact, his duties as the de facto project manager continued "as is" for several months after his request

for reclassification was denied, although during this time Coleman was compensated at the reduced, i.e., Planner II salary, since his temporary promotion had run out.

THE ALJ's DECISION

Although the sole adverse action alleged by Coleman, the District's September 8, 2008 decision to deny his request for reclassification, occurred more than six months before he filed the present charge, the ALJ deemed the charge timely filed under the doctrine of equitable tolling. The ALJ reasoned that, because Coleman had pursued the matter through the EA's grievance and arbitration machinery until March 26, 2009, when he learned that the EA would not agree to pay the costs of arbitration, he had made a good-faith effort to seek an alternative remedy.

However, the ALJ dismissed Coleman's claim of retaliation/discrimination. The ALJ concluded that Coleman had engaged in conduct protected by the MMBA, and that the District's denial of Coleman's request for reclassification constituted an "adverse action" within the meaning of the MMBA, PERB regulations and applicable Board precedent. However, the ALJ found that Coleman had not satisfied other elements for a discrimination/retaliation claim, including the requirement of "employer knowledge" of the employee's protected conduct and the requirement that the adverse action taken was *because of* the employee's protected activity. The ALJ also found that, even if Coleman had successfully shown all of the elements necessary for retaliation/discrimination, the complaint must still be dismissed because the District had shown that it would have denied Coleman's reclassification request anyway for "legitimate business," *i.e.*, non-discriminatory, reasons.

COLEMAN'S EXCEPTIONS TO THE PROPOSED DECISION

In his statement of exceptions, Coleman states three grounds for overturning the ALJ's proposed decision. First, Coleman disputes the ALJ's finding that the District did not have the

requisite knowledge of Coleman's involvement in protected conduct. Coleman also excepts to the ALJ's finding that the District's denial of Coleman's request for reclassification and, that its denial of Coleman's appeal of that decision, were not motivated by Coleman's involvement in protected conduct. Finally, Coleman excepts to the ALJ's finding that the District established its affirmative defense by showing that, even if it had acted for retaliatory purposes, the District would still have denied Coleman's request for reclassification, and his appeal thereof because of Judkins' policy of denying nearly all reclassification requests and parceling out any out-of-class duties to other employees. For each of these exceptions, Coleman argues that the ALJ did not consider highly relevant and material uncontested facts and that the ALJ erred in making factual findings that were unsupported by the record.[3]

DISCUSSION

In considering an appeal of a proposed decision, the Board reviews the entire record de novo. It may reverse the legal determinations of an ALJ and may draw different or even opposite inferences from the factual record than those drawn by the ALJ. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808a; *Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara*).) Coleman has excepted to the proposed decision's finding that he failed to satisfy two of the "elements" for a retaliation/discrimination claim – employer knowledge and unlawful motive or "nexus." He has also excepted to the proposed decision's finding that the District would have taken the adverse action Coleman complains of in any event, and that it would have done so for non-discriminatory reasons. We address each of the elements of Coleman's retaliation claim and the employer's affirmative

[3] Because we affirm the proposed decision, we find it unnecessary to recount the arguments contained in the District's responses to Coleman's exceptions.

defense below to further clarify the proposed decision with respect to the uncontested elements of "protected conduct" and "adverse action."

To establish a prima facie case of discrimination or retaliation in violation of MMBA section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action; and (4) the adverse action was motivated, at least in part, by the charging party's exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) The employer's unlawful motivation is thus an essential element of the charging party's case. In the absence of direct evidence, an inference of unlawful motive may be drawn from the record as a whole, as supported by circumstantial evidence. (*Novato*; *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S (*DPA*).)

From *Novato, supra*, PERB Decision No. 210, and other cases following it,[4] any number of circumstances may justify an inference of unlawful motivation on the part of the employer, including: the timing of the adverse action in relation to the employee's exercise of protected rights (*North Sacramento School District* (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (*State of California (Department of Transportation*) (1984) PERB Decision No. 459-S); a departure from established procedures or standards in dealing with the employee (*Santa Clara, supra,* PERB Decision No. 104); inconsistent or contradictory justification proffered by the employer for its actions (*State of California (Department of Parks*

[4] As explained in *DPA, supra,* PERB Decision No. 2106a-S, pp. 14-15, *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*City of Campbell*), and other judicial authorities that pre-date PERB's jurisdiction over the MMBA remain good law. When interpreting the MMBA, PERB may also take appropriate guidance from cases arising under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 et seq., and California labor relations statutes with parallel provisions and similar legislative purposes. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

and Recreation) (1983) PERB Decision No. 328-S (*Parks and Recreation*)); evidence of employer animosity towards other employees involved in protected conduct (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or any other facts which might demonstrate the employer's unlawful motive (*Novato*). While close temporal proximity of an employer's adverse action to the employee's involvement in protected conduct is an important factor to this inquiry *(Moreland Elementary School District* (1982) PERB Decision No. 227), PERB's cases generally hold that timing alone is insufficient to demonstrate the employer's unlawful motive, which is the necessary connection or "nexus" between the adverse action and the protected conduct. (*Los Angeles Unified School District* (2010) PERB Decision No. 2124.) In addition to timing, to state a prima facie case for retaliation, the charging party must generally allege facts constituting one or more *additional* circumstances supporting an inference of the employer's unlawful motive. In *Novato* and other cases, the Board has recognized that the list of possible factors developed in the Board's decisional law is merely illustrative and not exhaustive of the circumstances that may tend to prove an employer's unlawful motive was the causal nexus for taking an adverse action against the employee.

If the employer's conduct is "inherently destructive" of important employee rights, further proof of unlawful intent is not required under the MMBA, even if the employer's conduct was motivated by business considerations. (*City of Campbell, supra,* 131 Cal.App.3d 416, 423; *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221.) However, if the adverse effect on employee rights is "comparatively slight," unlawful intent must be proved if the employer produces evidence of legitimate and substantial business justifications. (*City of Campbell, supra*, at p. 424.)

Once an inference of unlawful motive is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employee's

protected activities and the employer's antiunion animus. (*Novato, supra,* PERB Decision No. 210; *Wright Line, Inc.* (1980) 251 NLRB 1083.)

Coleman's Involvement in Protected Activity

The ALJ found that Coleman engaged in conduct protected by section 3502 of the MMBA. We agree. Such conduct included his participation on the exclusive representative's negotiating team, his tenure as Vice President of Outreach for the EA, his participation in an informal grievance meeting to discuss proposed contracting out of Planner duties, his participation in a joint labor-management committee established by the parties' MOU for resolving classification issues, and his resort to the collectively-bargained procedures for requesting reassignment to a different supervisor requesting reclassification, and appealing reclassification request denials.

The MMBA expressly guarantees employee rights to "form, join, and participate in the activities of employee organizations," which includes serving as an official of the employee organization. (MMBA, § 3502; *City of Torrance* (2008) PERB Decision No. 1971-M, pp. 14-15.) Filing grievances or otherwise participating in the collectively-bargained grievance procedure is also protected employee conduct under the MMBA. (*City of Long Beach* (2008) PERB Decision No. 1977-M; *Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M.) Seeking the assistance or advice of the exclusive representative for the informal resolution of work-related disputes is likewise protected activity. (*City of Santa Monica* (2011) PERB Decision No. 2211-M; *County of Merced* (2008) PERB Decision No. 1975-M; *Regents of the University of California* (1995) PERB Decision No. 1087-H; see also *Los Angeles Unified School District* (1992) PERB Decision No. 957 [protected conduct includes acting on behalf of the union or in a representative capacity on

behalf of other bargaining unit members in employment-related matters].) In this regard, the ALJ's conclusions are well-supported and require no further discussion.

However, the rights to form, join, and participate in the activities of employee organizations guaranteed by section 3502 and the right to be free from employer interference, coercion, restraint or discrimination for the exercise of those rights are not the only employee rights set forth in the MMBA, nor the only ones raised by the parties in this case. Section 3502.1 specifically prohibits public employers from taking punitive actions, denying promotions, or threatening to take such actions, against an employee "for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit." (MMBA, § 3502.1.) Because section 3502.1 is raised in the parties' briefs but not discussed in the proposed decision,[5] and because we have not previously had occasion to consider this provision of the MMBA, we do so here.[6]

When interpreting a statute, "we begin with its plain language, affording the words their ordinary and usual meaning" and "giv[ing] meaning to every word of the statute, if possible, [to] avoid a construction that makes any word surplusage" (*Shady Tree Farms, LLC v. Omni Financial, LLC* (2012) 206 Cal.App.4th 131, 137; *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 928) or that "ascribes to the Legislature . . . the commission of a meaningless act." (*Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*), p. 8.) Only where the plain meaning of the statute is unclear may we turn to other

[5] The proposed decision references section 3502.1 as one of several provisions of law alleged to have been violated and section 3502.1 is again cited as one of the provisions of law *not* violated by the District in the proposed decision's "Conclusions of Law." However, section 3502.1 is neither cited nor discussed in the analysis portion of the proposed decision.

[6] In its post-hearing brief, the District explicitly discusses section 3502.1 before conceding that Coleman had engaged in protected activity under this provision of the MMBA by "serving as a union officer, bargaining for the MOU, and filing grievances."

sources to discern legislative intent. Such sources may include rules or maxims of construction, which express familiar insights about conventional language usage, the legislative history, and the wider historical circumstances of the statute's enactment. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663; *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1401 [in construing a statute, the legislative digest, legislative committee reports, bill reports, and other legislative records are appropriate sources from which legislative intent may be ascertained].) We also look to judicial interpretations of section 3502.1, in PERB's decisional law, and that of other tribunals interpreting labor relations statutes with similar purposes. (MMBA, § 3509; *DPA, supra,* PERB Decision No. 2106a-S, pp. 4-10; *McPherson v. Public Employment Relations Board* (1987) 189 Cal.App.3d 293, 305-311 (*McPherson*).)

Additionally, because "statutes should be interpreted to promote, rather than defeat, the legislative purpose and policy" underlying the statutory scheme, "the legislative intent underlying a statutory scheme is of primary importance." (*People v. Hacker Emporium, Inc.* (1971) 15 Cal.App.3d 474, 477-478 (*Hacker Emporium*).) We may therefore consider the impact of an interpretation on public policy "for where uncertainty exists[,] consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Although an interpretation consistent with the "plain meaning" of the statutory text is preferred, a literal interpretation or application of a statute which will nullify the legislative intent or lead to absurd or undesirable consequences constitutes an improper construction. (*Hacker Emporium, supra,* 15 Cal.App.3d 474, 477-478; *Peralta, supra,* PERB Decision No. 77.)

On its face, the plain language of section 3502.1 prohibits public employers from taking, or threatening to take, certain forms of adverse actions against an elected, appointed, or recognized representative of any employee bargaining unit for his or her exercise of lawful

action. This reading of the statute is not controversial and is entirely consistent with both judicial interpretations of the MMBA and PERB's case law. (*McPherson,* supra, 189 Cal.App.3d 293, 309-312 [endorsing private-sector precedent finding employer acted unlawfully by "threatening an employee who was acting as a union representative" and by "discharg[ing] an employee because [s]he was union president" and concluding that public employee's appointment to union's negotiating committee was "clearly protected union activity"].)

The more difficult issue is how to interpret section 3502.1 *in relation to other* provisions of the MMBA prohibiting interference, intimidation, restraint, coercion, discrimination or retaliation by the employer for the exercise of the rights of *all* employees to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (MMBA, §§ 3502, 3506.) Whereas the prohibition against retaliation contained in section 3506 references section 3502 as the source of protected rights, section 3502.1 contains both the prohibition against unlawful employer conduct and the source of the rights protected, i.e., the exercise of lawful action as a representative of an employee bargaining unit.

Because PERB is bound by judicial interpretations of the MMBA "existing" at the time that PERB assumed jurisdiction over the MMBA (§ 3509, subd. (b); *DPA, supra,* PERB Decision No. 2106a-S, p. 5, fn. 5, and pp. 8-15), we begin with the decisional law of California courts interpreting section 3502.1. Because section 3502.1 became law in 2001, there are no judicial interpretations of section 3502.1 that pre-date PERB's administration of the MMBA. Moreover, because the vast majority of unfair practice cases arising *after* section 3502.1's enactment have been processed through PERB's administrative proceedings, relatively few courts have had the opportunity to consider this language since its enactment. (*DPA, supra,* at

p. 8 [observing that "[o]nly a handful of court decisions have addressed discrimination and interference under MMBA section 3506" and including no discussion of section 3502.1].)

One of the few decisions to offer any guidance as to the meaning of section 3502.1 is *Ramirez v. Eckert* (2007) 2007 Cal.App. Unpub. LEXIS 6421 (*Ramirez*), an unpublished opinion in which the California Court of Appeal's Second District, Division Two Court reversed, in pertinent part, a trial court's dismissal of a police officer's writ petition alleging that the City of Hermosa Beach had violated section 3502.1 by denying him a promotion because of his service as a union official. (*Id.* at pp. 13-14.)[7] The Court of Appeal held that the plaintiff had stated a viable claim for violation of section 3502.1 by alleging that he was denied a promotion because of his exercise of lawful activity as a member and official of the police officer's association. (*Id.* at pp. 9-10.)

In reaching this conclusion, the appellate court observed that section 3506 of the MMBA only prohibits public agencies from interfering with, intimidating, restraining, coercing or discriminating against public employees for their exercise of rights guaranteed by section 3502, but makes no reference to the separate, more specific protections for employee representatives included in section 3502.1. Nevertheless, the appellate court also observed that the California Supreme Court "ha[s] consistently held that the Legislature intended in the MMBA to impose

[7] The only other such decision we have located is *Heuer v. City and County of San Francisco* (N.D.Cal. 2011) 2011 U.S. Dist. LEXIS131204, an unpublished federal district court decision, which granted summary judgment and dismissed the plaintiff's retaliation claim under section 3502.1. (*Id.* at pp. 26-29.) Under the California Rules of Court, Rule 8.1115, subdivision (a), neither a court nor a party may cite or rely on an unpublished trial or appellate court opinion. This rule does not apply to unpublished federal court opinions. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18.) The Board subscribes to the principle underlying Rule 8.1115 that for the orderly development of administrative decisional law, the Board does not rely on unpublished decisions as authority, does not consider them of precedential value, and does not defer to their reasoning. Although *Ramirez* and *Heuer* are cited herein, they are not cited for any of these impermissible purposes. They are cited merely as background information in our effort to provide a comprehensive treatment of section 3502.1.

substantive duties, and [to] confer substantive, enforceable rights, on public employers and employees" and, that "a writ of mandate [is] available to the parties to address *any* asserted violation of the duties imposed by the MMBA," including rights specifically guaranteed by section 3502.1. (*Ramirez, supra,* at p. 18 [citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539 (*Woodside*), emphasis added].) Noting that a "key purpose of the MMBA is to ensure a public employee's right to engage in a wide range of union-related activities without fear of sanction," the *Ramirez* court concluded that the plaintiff's claim that he had been denied a promotion because of his service as a union official was "precisely the type of conduct that the statute is designed to prohibit." (*Id.* at pp. 9-10, 11, and 18-19.) Thus, *Ramirez* holds that section 3502.1 is not merely hortatory language or verbal "fluff," but was included in the statute to guarantee substantive, enforceable rights to employees who serve as officers of the bargaining representative. Although we rely on the canons of statutory construction, rather than on *Ramirez*, we come to the same conclusion—that section 3502.1 contains substantive, enforceable rights—because we will not ascribe to the Legislature the commission of an idle or meaningless act. (*Peralta, supra*, PERB Decision No. 77, p. 8.)

Our review of the legislative history of Assembly Bill 1184, which became section 3502.1, confirms our view that, by enacting AB 1184, the Legislature intended to clarify and reinforce the existing rights of public employees under the MMBA to "form, join, and participate in the activities of employee organizations of their own choosing." (MMBA, § 3502.) As initially drafted and introduced in February 2001 by Assembly Member Jenny Oropeza, AB 1184 would have amended several provisions of the Peace Officers' Bill of Rights (Govt. Code, §§ 3300 *et seq.*), to ensure that peace officers are not punished for their lawful activities as leaders of their local associations and to provide various other procedural protections to peace officers accused of wrongdoing. However, in July 2001, when the bill reached the

Senate floor, it was rewritten in its current form to guarantee that *all* individuals acting lawfully as employee representatives, enjoy specific protections against disciplinary actions, denial of promotions, or threats by their public employers to carry out the same actions, when such actions or threats are motivated by the employee's service to an employee organization.

Other documents included in the legislative history confirm that, by enacting section 3502.1, the Legislature did not intend to create a new or separate category of unfair practice, but to *clarify* the protections which, in the Legislature's view, were *already* afforded to employee bargaining unit representatives. For example, the legislative digest indicates that the bill was regarded as "declaratory of existing law." Although the Legislative Counsel's summary digests are not binding, "they are entitled to great weight" because they "constitute[] the official summary of the legal effect of the bill and [are] relied upon by the Legislature throughout the legislative process." (*Mt. Hawley Ins. Co. v. Lopez, supra*, 215 Cal.App.4th 1385, 1401.)

An analysis prepared for the Senate Rules Committee for the bill's third reading, i.e., after it had been completely re-written, gives some indication of why Assembly Member Oropeza and other Legislators thought it necessary to make "explicit" what was already implied by existing case law:

> Many times, leaders of public employee unions are directed by their members to make statements or take actions, which may be critical of management in a particular city or county, such as directing a vote of no confidence or addressing issues of collective bargaining and employee rights. Often, these union leaders are punished for their leadership role by being assigned to unwanted shift schedules, unpopular "beats," and vacation or "days off" changes that many times opposite of those requested by that officer. This measure addresses those actions taken by management which go a step further, such as any kind of a punitive action, denied promotion, or threat of any such treatment because of the association leader's lawful actions as the representative of the bargaining unit.

(See analysis of AB 1184 for Senate Rules Committee prepared by Bruce E. Chan.)

Because the Legislature "is presumed to act with knowledge of existing laws and judicial decisions at the time that it enacts or amends a statute" (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 443; *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609, internal quotations omitted), we conclude that, by enacting AB 1184, the Legislature wished to clarify and reinforce the rights of employees guaranteed by the MMBA. (See, for example, *Crowley v. City and County of San Francisco* (1978) 83 Cal.App.3d 776, 779 [cautioning that a city's administrative rule authorizing investigation of a public employee for misconduct allegedly occurring while the employee was on a leave of absence to perform union business cannot lawfully be applied in such a way as to discourage the exercise of employees' statutory rights to participate in the activities of employee organizations].)

Nor are we limited to the few court opinions that have addressed discrimination and interference under the MMBA to determine what the Legislature regarded as the rights of the employee representative under the "existing law" in 2001, when it enacted section 3502.1. (*DPA, supra*, PERB Decision No. 2106a.) In *DPA,* PERB reviewed the standards for interference and discrimination under the NLRA, under pre-2001 judicial interpretations of the MMBA, and under PERB's own case law and concluded that judicial interpretations of the MMBA have been "nearly identical" to the standards for finding interference and discrimination used by the National Labor Relations Board (NLRB) in the private sector. (*Id.* at pp. 8-10; see also *McPherson, supra*, 189 Cal.App.3d 293, 440.) We may therefore look to private-sector decisional law, as it existed in 2001, for guidance on the Legislature's understanding of the MMBA at the time it enacted section 3502.1. (*DPA, supra*, at pp. 8-10 [finding California judicial interpretations of MMBA "nearly identical" to NLRB's decisional law.)

The NLRB's decisional law recognizes service as a union official as a form of protected activity worthy of the utmost protection. (*Limbach Company* (2002) 337 NLRB 573, 589.)

Indeed, among the fact patterns which the NLRB has routinely found to be "inherently destructive" of employee rights, meaning that the conduct itself serves as sufficient evidence of the employer's unlawful motive,[8] are cases involving an employer's discharge, refusal to hire, re-hire or promote employees who serve as stewards, local presidents, or other officials of the union. (See, for example, *Allis-Chalmers Corp.* (1977) 231 NLRB 1207, 1213; *Consumers Power Co.* (1979) 245 NLRB 183; *Cirker's Moving & Storage Co., Inc* (1994) 313 NLRB 1318.) In finding such actions "inherently destructive" of employee rights, the NLRB has explained that the "natural and foreseeable consequence" of permitting an employer to discriminate against employee representatives is an inevitable chilling effect upon the rights of *all* employees. (*Cives Corp., Northeast Constructors* (1972) 198 NLRB 846, 851; *Hyster Co.* (1972) 195 NLRB 84, 90; *Dravo Corp.* (1977) 228 NLRB 872, 874; *Pittsburgh Press Co.* (1978) 234 NLRB 408; and *Caterpillar Inc.* (1996) 322 NLRB 674, 675.)

We find these authorities both persuasive and entirely consistent with the legislatively declared purpose of the MMBA of ensuring that public employees in California may engage in a wide range of union-related and other protected activities without fear of reprisal. (*Woodside, supra,* 7 Cal.4th 525, 555-556, superseded by statute on other grounds, as recognized by *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations*

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[8] *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221: An employer's "inherently discriminatory or destructive nature of the conduct" supplies its own evidence of unlawful motive. In such cases, the employer is presumed "to intend the very consequences which foreseeably and inescapably flow from [its] actions [because the] conduct does speak for itself – it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but . . . must have intended." *American Ship Building Co. v. NLRB* (1965) 380 U.S. 300, 311-312: "[T]here are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification . . . that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." See also *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 32.

Bd. (2005) 35 Cal.4th 1072, 1077; *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403.) We are also bound by judicial interpretations of the MMBA "existing" at the time PERB assumed responsibility for administering the statute. (MMBA, § 3509, subd. (b); *City of Campbell, supra*, 131 Cal.App.3d 416, 423 [concluding that MMBA's language regarding employee right is "patterned closely upon analogous provisions" of the NLRA].) And, we may take guidance from persuasive authority interpreting other PERB-administered statutes, which have endorsed "the array of sound NLRA precedent . . . establishing the parameters of protected conduct in the labor relations context." (*McPherson, supra*, 189 Cal.App.3d 293, 440.)

The fact that section 3502 of the MMBA includes overlapping, and arguably broader, protections for all employees subject to the Act neither renders section 3502.1 superfluous, nor makes the MMBA unique in this regard. The NLRA, which served as a model for the Legislature when it drafted the MMBA and other California labor relations statutes (*Campbell, supra*, 131 Cal. App. 3d 416, 423), includes an analogously overlapping provision, which may shed light on the purpose of section 3502.1. Section 8(a)(1) of the NLRA makes it unlawful for employers "to interfere with, restrain, or coerce employees in the exercise of the rights" guaranteed by section 7 of the statute. Section 8(a)(3) makes it unlawful for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." There has never been any serious question that, among the employee rights guaranteed by section 7, is the right to use the NLRB's own administrative processes for investigating and adjudicating allegations of unfair labor practices, without reprisal or interference. (*Kramer* (1941) 29 NLRB 921, 935; *Burnside Steel Foundry Co.* (1946) 69 NLRB 128, 136-137; *International*

Union of Operating Engineers (1964) 148 NLRB 679, 681; *Nash v. Florida Industrial Commission* (1967) 389 U.S. 235, 238.)

Nevertheless, the NLRA also contains section 8(a)(4), a provision separate from sections 8(a)(1) and 8(a)(3), which makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he [sic] has filed charges or given testimony under this Act." The fact that the employer conduct prohibited by section 8(a)(4) overlaps considerably with conduct prohibited by other provisions of the NLRA does not mean that Congress or the NLRB regard section 8(a)(4) as unimportant or unnecessary. To the contrary, the NLRB has interpreted section 8(a)(4) as singling out certain employer conduct for special attention and vigorous enforcement, notwithstanding the fact that the conduct prohibited by that section may already be prohibited by other provisions of the statute. The NLRB has held that, by enacting section 8(a)(4) Congress not only authorized the agency to protect employees who participate in the NLRB's administrative processes, but also *imposed an affirmative duty* to exercise that authority *to the fullest extent permitted by the statute* (*Vacuum Platers, Inc.* (1965) 154 NLRB 588, 607, enf'd (7th Cir. 1967) 374 F.2d 866, 867.) It has similarly held that section 8(a)(4) must be read broadly rather than narrowly in order to effectuate the remedial purpose of that provision. (*International Union of Operating Engineers, supra,* 148 NLRB 679, 681.) In short, to the extent section 8(a)(4) overlaps with other provisions of the NLRA, it can be understood as Congress's attempt to clarify existing law by placing an exclamation point behind it.

In a similar manner, we read section 3502.1 as singling out certain forms of employer conduct, i.e., retaliatory acts against recognized, appointed or elected representatives, as a means of clarifying *and punctuating* the MMBA's existing protections against retaliation and discrimination. As explained in the Legislative Digest and in the record of the Committee

Reports, because employee organizations routinely call on their leaders to take positions and speak publicly on behalf of employees, section 3502.1 was intended to "reinforce[] an employee's right to [assume a] leadership role in a union" and "tak[e] a position against management practices . . . without reprisal from the employer." (Assembly Member Oropeza Statement in Support of AB 1184 included in Senate Rules Committee Report at Third Reading, July 17, 2001.) Moreover, like the NLRB's interpretation of section 8(a)(4), we understand section 3502.1's potential overlap with other sections of the MMBA not as an indication of its weakness, but as a directive from the Legislature to read its language *as broadly as is consistent with the statute* in order to fully effectuate its purpose of identifying and fully remedying instances in which an official of the employee organization has suffered adverse action for his or her protected activity on behalf of other employees.

Thus, in clarifying existing law, section 3502.1 also codifies and punctuates PERB's decisional law, which has long emphasized the likely "chilling effect" that may reverberate throughout the bargaining unit when one of the employees' leaders has been the victim of a threat or reprisal. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 10-12; *County of San Joaquin (Health Care Services)* (2001) PERB Order No. IR-55-M; see also *Rancho Santiago Community College District* (1986) PERB Decision No. 602 [applying similar reasoning to interference with *employee organizational* rights].) Although it is "axiomatic that discrimination against a union activist not only affects that individual, but also has a chilling effect upon the rights of all employees" (*Los Gatos-Saratoga School District* (1989) PERB Decision No. 742, p. 2, Member Craib concurring and dissenting opinion), it nonetheless remains difficult to identify and fully remedy its often hidden consequences. We understand section 3502.1 as legislative recognition of this "chilling

effect" and as an attempt to address it, by clarifying and reinforcing protections against some of the more visible forms of unlawful employer conduct.

With the above discussion in mind, we conclude that Coleman's involvement with the EA's negotiating committee, his tenure as Vice President of Outreach, and his participation on the joint labor-management committee concerned with classification issues, fall squarely within the language and purpose of section 3502.1, whose purpose is to guarantee the exercise of rights afforded to all employees under section 3502 of the MMBA. In each of these official capacities, Coleman was acting lawfully as an "elected, appointed or recognized representative" of the exclusive representative and, in so doing, he enjoyed the explicit protection of section 3502.1 against retaliatory denial of promotion.

In so ruling, we are aware that some decisions interpreting other PERB-administered statutes have held that an employee who "merely" serves as a site representative, steward, officer, or even president of the local union, does not thereby demonstrate his or her participation in "sufficient" protected activity to warrant the statutory protections against discrimination or retaliation. (*County of Orange* (2011) PERB Decision No. 2155-M; *Trustees of the California State University* (2009) PERB Decision No. 2038-H (*Trustees of CSU*), pp. 10-11.) However, we believe that, by enacting section 3502.1, the Legislature intended to afford MMBA employees serving in an official capacity on behalf of a bargaining unit explicit statutory protection against retaliation in certain employment decisions, including promotional opportunities and decisions. (MMBA, § 3502.1; cf. *City and County of San Francisco* (2004) PERB Decision No. 1664-M, p. 11 [finding employee's status as chapter president and union steward "certainly" demonstrates protected conduct under section 3502 of MMBA but not specifically addressing section 3502.1].)

Even without the statutory directive of section 3502.1, we believe this interpretation is more consistent with our decisional law than the narrower view of "protected conduct" advanced in *County of Orange, supra*, PERB Decision No. 2155-M, *Trustees of CSU, supra*, PERB Decision No. 2038-H, and similar cases, which held that alleging one's status as a union leader or office holder did not demonstrate sufficient participation in protected activity to survive dismissal of the charge.[9] As in the private sector, it is axiomatic under *all* PERB-administered statutes that there can be no discrimination or retaliation if the employer is unaware of the charging party's involvement in protected activity. (*Sacramento City Unified School District* (1985) PERB Decision No. 492; *Fry Roofing Co.* (1978) 237 NLRB 1005, enforced (6th Cir. 1981) 651 F.2d 442; *A to Z Portion Meats v. NLRB* (6th Cir. 1980) 643 F.2d 390, denying enforcement to 238 NLRB 643.) In addition, to state a prima facie case for discrimination or retaliation, the charging party must demonstrate the element of "unlawful motive" or "nexus," *i.e.*, that the employer's decision to take adverse action was *because of* the charging party's involvement in protected activity. (*Novato, supra,* PERB Decision No. 210.) Consequently, whatever the specifics of their protected activity, employees must *separately* show that the *employer knew of that activity*, and that there is at least a reasonable inference, based on the evidence, that some adverse action was taken *because of* the employee's protected conduct.

Because, in the absence of "inherently destructive" conduct, our jurisprudence already requires that a charging party allege facts demonstrating the *separate* elements of "employer

[9] We also note that *Trustees of CSU* cites *Chula Vista Elementary School District* (1997) PERB Decision No. 1232 for the proposition that serving as the union's site steward does not establish that an employee has "engaged in actual protected conduct." However, in *Chula Vista*, we found that the charge failed to state a prima facie case because there was no temporal relationship or other "nexus" factors to establish that the adverse action was prompted by the employee's protected conduct. (*Id.* at p. 4 [finding charging party's maintenance of his position as union's site steward, because it spanned several years, was "insufficient to satisfy *the timing element* of the *Novato* test," emphasis added].)

knowledge" and "nexus," we see no purpose served in arbitrarily "raising the bar" for employees to show their "protected activity" by requiring that they allege that they have engaged in "something more" than holding union office. (See, *e.g., Central Union High School District* (1983) PERB Decision No. 324, pp. 4-5; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778; *Fresno County Office of Education* (2004) PERB Decision No. 1674, p. 8.) In light of the above interpretation of section 3502.1, we find *County of Orange, supra,* PERB Decision No. 2155-M, *Trustees of CSU, supra*, PERB Decision No. 2038-H, and similar authorities requiring an employee to do "something more" than "merely" holding union office to demonstrate "protected conduct" inapplicable in the MMBA context. We reserve for another day ruling on the continued viability of these authorities under the other statutes administered by PERB.

Adverse Action

The ALJ found that the District's denial of Coleman's request for reclassification constituted an "adverse action" within the meaning of the anti-discrimination provisions of the MMBA, PERB Regulation 32603(a), and Board precedent. We agree with this finding, particularly on the facts of this case and the statutory context of the MMBA. (MMBA, §§ 3502 [guaranteeing the rights of all employees under MMBA "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations"], 3502.1 [expressly mentioning denial of promotion as prohibited conduct when undertaken against public employees who have participated in any "lawful action as an elected, appointed, or recognized representative of any employee bargaining unit"] and 3506 [prohibiting interference, intimidation, restraint, coercion or discrimination against public employees for their exercise of any rights guaranteed by section 3502]; PERB Reg. 32603(a) [making it an unfair labor practice for a public agency

to "[i]nterfere with, intimidate, restrain, coerce or discrimination against public employees because of their exercise of rights guaranteed by [section 3502] or by any local rule [of the agency].

The test for finding adverse action in retaliation/discrimination cases is an "objective" one. (*Novato, supra,* PERB Decision No. 210; *Palo Verde Unified School District* (1988) PERB Decision No. 689 (*Palo Verde*), pp. 12-13; *DPA, supra*, PERB Decision No. 2106a-S, p. 13.) In *Palo Verde*, the Board explicitly recognized changes to an employee's compensation and level of duties as "objective" criteria for determining whether the employer's action was "adverse." Our case law on the scope of negotiable subjects has also recognized that "job classifications are an integral part of civil service systems established in public sector jurisdictions," and that, because "the title of a classification describes the nature and level of duties performed and the relationship of one classification to other classifications in the same occupational group," the job title given to a classification is a factor in determining such "objective" results as employees' salaries, transfer rights, and reassignments, including promotional opportunities. (*Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, pp. 5, 13.) More specifically, the Board explained that:

> Employees are naturally concerned about the job title which defines their working existence and contributes significantly to their concept of self-worth and identity. While this is an intangible and subjective condition of employment, it is nevertheless quite real and often of paramount importance to employees. Changes in job title have not infrequently been important components of labor-management agreements and of serious labor disputes. . . .

(*Id.* at p. 14; see also *Palo Verde, supra*, at p. 12, esp. fn. 5 [employee's "subjective" perception, while not dispositive of whether action was "adverse," may nonetheless be taken into account when supported by other "objective" criteria, such as level of compensation or duties assigned].) Accordingly, we adopt the ALJ's finding that the District's decision to deny

Coleman's request for reclassification and associated grievance was an "adverse action," both under the general framework used for all PERB-administered statutes and, because of Coleman's official positions with the exclusive representative, with the specific statutory context of the MMBA. (MMBA, § 3502.1 [expressly listing "denial of promotion" as prohibited employer conduct when motivated by the employee's service as a union official].)

On direct examination, Coleman also testified that *after* January 18, 2009, when CAO Judkins denied Coleman's appeal, and continuing until approximately November 2009, when the Environmental Impact Report for the Alviso Slough Restoration Project was certified, he "carried on the same duties" as he had during his two-year, temporary promotion to acting project manager. He also testified that, except for a three-month hiatus, he continued to perform essentially the same duties on the project as of the date of the hearing. This testimony was never stricken from the record and the ALJ found that Coleman's duties "continued for a number of months as is," even after Judkins denied Coleman's reclassification and grievance. (Proposed dec. at p. 20.) However, the ALJ also sustained a relevance objection later interposed by counsel for the District to "this entire line of questioning," and admonished counsel for Coleman that he would not entertain a motion to further amend the complaint to allege that the District had taken a *second* adverse action against Coleman by requiring him to continue performing out-of-class work, long after it had denied his reclassification and directed that he be stripped of any out-of-class duties.

The Board may, as part of its de novo review, consider previously unalleged violations that are closely related to the subject matter of the complaint, whose issues have been fully litigated, and whose factual allegations the parties have had ample opportunity to explore through examination and cross-examination. (*Santa Clara, supra,* PERB Decision No. 104.) However, we decline to do so here because we find nothing in Coleman's statement of

exceptions referring, even by implication, either to the ALJ's evidentiary ruling, nor to the ALJ's refusal to amend the complaint to include allegations of a separate adverse action whereby Coleman was allegedly required to continue performing out-of-class duties, after his grievance was denied.

Employer Knowledge of Coleman's Protected Activity

The ALJ found no evidence that either Hsueh, the acting appointing authority who "strenuously disagreed" with the consultant's July 18, 2008 report supporting Coleman's request for reclassification, nor Judkins, the District official who was ultimately responsible for denying Coleman's request for reclassification and his appeal thereof, had any knowledge of Coleman's participation in protected conduct *at the time* that they determined that Coleman's request should be denied. With respect to Hsueh, the ALJ found that, as of late summer or early autumn 2008, when she intervened in the reclassification review process, she was unaware of Coleman's participation in the informal grievance resolution meeting concerned with a proposal to contract out Planner duties, his involvement in negotiations as part of EA's bargaining team, or his tenure as EA's Vice President of Outreach. (Proposed dec. at p. 14.)

The ALJ also found that Judkins was unaware of Coleman's involvement with EA's negotiating team until "September 2008 and early December 2009," because Judkins only became the District's CAO over Human Resources in April 2008, and did not personally attend bargaining sessions where Coleman had been present. (Proposed dec. at p. 17.) The proposed decision includes no specific finding as to whether Judkins was aware of Coleman's involvement in the informal grievance meeting regarding subcontracting issues, or of his service as EA's Vice President for Outreach. However, the ALJ concluded that "Judkins' testimony that she was unaware of Coleman's protected [union] activities *while deciding the reclassification* request was consistent with other evidence in the record, including Judkins' times of employment, the

time the MOU was negotiated, and her lack of dealings with union officers. Each of these categories of circumstantial evidence was unrebutted by Coleman. (Proposed dec. at p. 26.)

The ALJ also considered, but rejected, the "subordinate bias liability theory" as an alternative method for demonstrating the District's knowledge of Coleman's protected activity. Under the "subordinate bias liability theory," the unlawful motive of a supervisor or other lower-level official may be imputed to the decision maker responsible for authorizing an adverse action against the charging party, when: (1) the lower-level official's recommendation, evaluation, or report was motivated by the employee's protected conduct; (2) the lower-level official intended for his or her conduct to result in an adverse action; and (3) the lower-level manager's conduct was a motivating factor or proximate cause of the decision to take adverse action against the employee. The cases are clear that even where the decision maker's actions are entirely free of animus, the employer will nonetheless be held liable when the decision was influenced by the unlawful animus of the lower-level official. (*State of California (Department of Corrections*) (2001) PERB Decision No. 1435-S (*Corrections*); *Parks and Recreation, supra,* PERB Decision No. 328-S.) The basic rationale for imputing the unlawful motive of the supervisor or lower-level official to an ignorant and otherwise innocent decision maker is that, by providing inaccurate, biased or incomplete information about the charging party, the supervisor or lower-level manager has effectively tainted the decision-making process for the employer as a whole.

Relying on the District's class specification for the Planner series, which was adopted in March 2005 to cover the Planner I, Planner II, and Senior Planner job titles, the ALJ first noted that the distinguishing characteristics for the Senior Planner position were *a combination* of performing *both* "complex and difficult environmental planning work," *and* "lead" duties, which are described in the class specification document as exercising "functional and/or technical

supervision over lower level staff, including but not limited to environmental planners and consultants." (Proposed dec. at pp. 5-6, esp. p. 6, fn. 5, emphasis added.) Because there was undisputed testimony that Coleman did not, in fact, perform such "lead" functions, the ALJ concluded that any lower-level management officials, including Chesterman or Oven, who may have harbored animus against Coleman as a result of his protected conduct, did not provide biased or inaccurate information to either Hsueh or, more importantly, Judkins.

Insofar as it goes, the ALJ's analysis is correct. Where a lower-level manager – even one who may harbor unlawful animus against the charging party – nonetheless provides accurate information to the decision maker, there can be no liability under the subordinate bias liability theory because the decision-making process itself was not tainted by biased or inaccurate information. However, PERB case law has recognized that a subordinate employee may taint the decision-making process not only by providing biased or inaccurate information about the charging party, but also by presenting *incomplete* information, *i.e.*, withholding material facts that, if known by the decision maker, may have altered the outcome. (*Corrections*, *supra*, PERB Decision No. 1435-S.) Because the proposed decision does not address the possibility, under the subordinate bias liability theory, that animus may be imputed to the employer by virtue of *incomplete* information provided to its decision maker, the Board has reviewed the record for evidence that Chesterman or Oven may have neglected to disclose to Hsueh or Judkins that at least two other employees in the District with the Senior Planner classification, Smith and Neudorf, did not perform lead functions either.

However, the undisputed evidence is that, as early as September 2008, Judkins had received a report from her staff and was thus *already aware* that there were other Senior Environmental Planners in the District who "did not typically meet the clear definition of supervising others," as required by the District's class specification document. Thus, even if it

were shown that Chesterman and/or Oven had failed to disclose this material fact to Judkins, she could not have relied on their silence, since she became aware of the other Senior Planners' duties by way of a staff report.

Moreover, the record shows that Chesterman and Oven were in the chain of command for the Capital Programs Services Division, while Smith and Neudorf worked in the separate Watershed Operations and Water Utility Enterprise Divisions, respectively. The record gives no indication that either Chesterman and/or Oven *knew* about Smith or Neudorf's lack of supervisory duties, much less does it suggest that either of them made a conscious effort to *conceal* such facts from either Hsueh or Judkins, whether due to anti-union animus against Coleman or for any other reason. In sum, the existing record does not include sufficient facts to support an inference that either Hsueh or Judkins were biased in their decision to oppose Coleman's reclassification by a subordinate employee's omission of material facts, even assuming anti-union hostility on the part of Chesterman and Oven.

In his statement of exceptions, Coleman cites to *Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186 and other federal judicial authorities for the proposition that, rather than looking for a direct line of communication to impute knowledge and animus from Oven or Chesterman to Hsueh and then to Judkins, the proper inquiry should have been whether bias and/or improper influence "worked its way into the process." Assuming, without deciding that these authorities offer appropriate guidance for the issue at hand, our review reveals that the authorities cited by Coleman use a test that is, for all practical purposes, indistinguishable from the one adopted by PERB. Likewise, with the exception of the possibility that *incomplete* information tainted the decision-making process, which we have separately analyzed and rejected, the test urged by Coleman is likewise indistinguishable from the one employed by the ALJ. (*Id.* at pp. 1192-1193

[employer at fault where one of its agents has acted based on discriminatory animus that was intended to cause harm and that was at least one of multiple proximate causes of the harm that resulted].)[10] Our decision in *Corrections*, *supra*, PERB Decision No. 1435-S, demonstrates that we are generally less concerned with *how* unlawful animus may "work its way into the [decision-making] process," than with pointing to *some* evidence, even if circumstantial or inferred from the record as a whole, of how the unlawful animus was at least one, among other, *causal* factors in the decision to take adverse action against the charging party. Here, the facts do not suggest that Judkins, or even Hsueh, knew of Coleman's involvement in protected conduct *at the time* when Judkins decided to deny Coleman's request for reclassification nor that such knowledge can be imputed to Judkins, based on the anti-union animus of Chesterman or Oven, because Judkins does not appear to have relied on any biased information or material omissions of fact stemming from Chesterman or Oven to arrive at her decision to deny Coleman's reclassification.

Nor, in the absence of any facts to suggest that the denial of Coleman's request for reclassification was attributable to the union offices he held, can we conclude that the District's conduct was "inherently destructive" of employee rights or the EA's role as the exclusive representative. Coleman requested reclassification *in his capacity as an employee*, not in his capacity as a union official. In the absence of separate facts demonstrating employer knowledge, there is therefore no basis for treating the District's denial of Coleman's request as conduct that,

[10] Based on the facts before it, the *Staub* Court discusses the *actions* of an employer's agent that are motivated by discriminatory animus. However, we find nothing in the majority opinion that is inconsistent with our decisions holding that a material *omission* by the employer's agent may also result in liability for discrimination or retaliation.

by its very terms, "supplies its own evidence of unlawful motive." (*Erie Resister Corp., supra*, 373 U.S. 221, 230-232.)[11]

Accordingly, the Board must affirm the ALJ's finding that Coleman has failed to demonstrate employer knowledge of his protected activity and that the charge and associated complaint must therefore be dismissed.[12]

The Timing of the Adverse Action and Other Factors for Showing Unlawful Motive

On the first day of the hearing, at Coleman's request, the ALJ amended the complaint to include additional facts regarding Coleman's involvement in protected conduct and we understand the effect of the amendment to be to extend the time period in which Coleman was involved in protected conduct. However, even assuming that with these additional facts, Coleman could demonstrate some degree of temporal proximity of his protected conduct to the District's decision to take adverse action, as explained in the proposed decision, the charge and

[11] On the facts of this case, we merely hold that, unlike employer conduct that, on its face, discriminates on the basis of union membership or service as an officer of the union, and whose unlawful motive may reasonably and logically be inferred from the conduct itself, the denial of an employee's request for reclassification is the kind of employment decision for which some knowledge of the employee's protected conduct will generally be necessary. (Cf. *American Ship Building Co, supra,* 380 U.S. 300, 311-312 and *Great Dane Trailers, supra,* 388 U.S. 26, 32.) We thus reserve for another day the question of whether an employer's transgression of MMBA section 3502.1 may be appropriately analyzed as "inherently destructive" conduct, as opposed to requiring separate proof of unlawful motive under the *Novato* and *Wright Line* cases.

[12] There is, of course, no question that, as of September 2008, when she reviewed Coleman's request for reclassification, or as of November 8, 2008, when she denied that request, or as of January 18, 2009, when she denied the related grievance, Judkins *was aware* of Coleman's participation in the exclusive representative's collectively-bargained reclassification request and grievance/appeal procedures. However, such knowledge is only relevant to the extent there are circumstances, *other than the denial of the grievance*, to suggest unlawful motive. Otherwise, every denied grievance would be bootstrapped into a retaliation claim. Moreover, because Coleman has not excepted to the ALJ decision to close off any inquiry into the District's treatment of Coleman *after* Judkins denied his grievance, we must agree with the ALJ that the record is insufficient to establish that Judkins, the District's critical decision maker, had the requisite knowledge of Coleman's protected activity, much less animus toward Coleman *because of* his protected activity.

complaint must nevertheless be dismissed for failure to satisfy various other elements of a discrimination/retaliation case. That is, assuming, *arguendo*, that the timing of the District's adverse action supported an inference of unlawful motive, Coleman must also show at least one *additional* factor to establish the necessary nexus between his protected conduct and the decision to deny his request for reclassification.

An employer's disparate treatment or departure from established practice in dealing with the employee is one such factor (*City of Milpitas* (2004) PERB Decision No. 1641-M) and Coleman points to the fact, mentioned above, that at least two other Senior Planners employed by the District did not perform the "lead" or supervisory duties cited by the District as the basis for denying Coleman's request for reclassification from Environmental Planner II to the Senior Planner position. While the record indicates that two other Senior Planners have not performed "lead" duties, the District's written class specification documents support the District's determination that, in the absence of such duties, a Planner is not performing all of the duties required for the Senior Planner position. The Board agrees with the ALJ's finding that Coleman has not met his burden of establishing that the District has meted out disparate treatment or otherwise departed from an established practice when it reviewed and denied Coleman's request for reclassification. (*Rio School District* (2008) PERB Decision No. 1986, p. 17 [where charging party fails to demonstrate what the employer's established procedure was at the time it took adverse action, there is insufficient evidence to conclude that the employer departed from that procedure in dealing with the employee].)

Moreover, PERB has held that the fact that an employer's personnel practices are themselves inconsistent or otherwise less than exemplary is, by itself, insufficient to raise an inference of unlawful motive in the employer's dealings with the charging party. (*San Diego Unified School District* (1991) PERB Decision No 885.) Coleman correctly points out that at

least two divisions within the District followed classification practices that were at odds with the District's written guidelines for Senior Planners, and that Judkins took no action to strip Smith or Neudorf of their Senior Planner titles and compensation once she learned that they performed no lead functions. However, we cannot conclude that these facts are sufficient to prove that the District acted disparately towards Coleman or violated its own "established" procedures when dealing with Coleman, since the District could, legitimately, have decided to "grandfather" Smith and Neudorf and bring its practices into conformity with the written specifications on a prospective basis. But that does not mean it must grant additional reclassifications, such as Coleman's, which would have only deepened the gulf between the District's actual practice and its written prescription for making classification decisions.

Another factor that may support an inference of unlawful motive in a discrimination/retaliation charge is the employer's cursory investigation before making the decision to take adverse action against the charging party. However, as described above, the District's investigation and review of Coleman's request for reclassification was fairly detailed and exhaustive. That process included interviews with both Coleman and his supervisor by an independent consultant retained by the District and various staff reports and summaries that, by all appearances, disclosed to Judkins all the material facts, including the existence of two Senior Planners who did not perform supervisory duties. Coleman correctly observes that Hsueh and Judkins were, by their own admission, not particularly well-informed about Coleman's precise duties. In fact, Judkins ultimately ordered that Coleman's out-of-class duties be removed, without even knowing what they were. However, in accordance with her position as CAO and the approach adopted by Judkins upon assuming that position, she testified credibly that she was less concerned with ascertaining the precise facts of an individual employee's duties, than with determining whether the work performed by the individual requesting reclassification was

necessary to the District's mission and, if so, whether the same work could legitimately be performed by someone else, thereby obviating the need for reclassification. Thus, the fact that Judkins was relatively removed from the facts of Coleman's situation and admittedly unaware of Coleman's actual duties probably goes more to show that she was motivated by legitimate managerial or budgetary concerns than by anti-union animus, particularly in light of the ALJ's finding that she was unaware of Coleman's involvement with the EA *at the time* she made her initial decision to deny his petition for reclassification. Thus, the Board must agree with the ALJ's determination that, even apart from his failure to demonstrate employer knowledge of his protected activities, Coleman has failed to meet his burden of proof to establish the separate element of "nexus" or unlawful motive.

The District's Affirmative Defense of Legitimate Business Purpose

Even assuming that the District had acted with the requisite knowledge and animus, pursuant to the approach adopted by Judkins for denying virtually all reclassification requests that came before her and reassigning any out-of-classification duties elsewhere, we must likewise affirm the ALJ's conclusion that, under the "but for" test adopted by the Board, the District has successfully proven its affirmative defense of legitimate business purpose. That is, it has shown that it would, in any event, have taken the decision to deny Coleman's reclassification request, *regardless of his involvement in protected conduct*. (*Novato, supra,* PERB Decision No. 210; *Wright Line, supra,* 251 NLRB 1083.) Of particular significance here is the undisputed evidence that during Judkins' tenure as CAO, she granted only two of twenty requests for reclassification. (Proposed dec. at p. 31.)

Conclusion

Although Coleman has demonstrated that he engaged in protected activity and that he suffered an adverse action when his request for reclassification and associated grievance were

denied, for all of the above reasons, we agree with the ALJ's conclusion that he has not demonstrated that the District's decision-maker knew of his protected conduct, at least at the time she made her initial decision to deny the reclassification request, or that she acted with an unlawful retaliatory motive when making that determination. Additionally, in light of the overwhelming evidence of Judkins' practice of denying reclassifications and reassigning any out-of-classification duties to other employees, we also agree with the ALJ that the District has successfully proven its affirmative defense, under the "but for" test, that Coleman would have suffered the same adverse action, regardless of his involvement in protected activity. In light of the foregoing, we must likewise affirm the ALJ's decision to dismiss the charge and complaint.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-663-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL COLEMAN, Charging Party, v. SANTA CLARA VALLEY WATER DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-663-M PROPOSED DECISION (January 13, 2012)

Appearances: Gattey and Baranic by Jason L. Aldrich, Attorney, for Michael Coleman; Meyers Nave by Samantha W. Zutler, Attorney, and Brian C. Hopper, Assistant District Counsel, for Santa Clara Valley Water District.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a public employer's denial of an employee's reclassification request because of his protected activities. The employer denies committing any unfair practices.

On June 4, 2009, Michael Coleman (Coleman) filed an unfair practice charge (charge) against the Santa Clara Valley Water District (District). On April 30, 2010, the Public Employment Relations Board (PERB) Office of General Counsel issued a complaint alleging that the District violated Meyers-Milias-Brown Act (MMBA)[1] sections 3502.1, 3506 and 3509(b) and PERB Regulation 32603(a) and (g) by denying Coleman's request for reclassification.

On May 19, 2010, the District answered the complaint, denying any violation of the MMBA or PERB Regulation. The District affirmatively alleged that the filing of the charge

[1] Unless otherwise indicated, all statutory references are to the Government Code. MMBA is codified at section 3500 and following. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 and following.

was untimely. On July 28, 2010, an informal settlement conference was conducted, but the matter was not resolved.

On February 7, 2011, the first day of scheduled formal hearing, Coleman requested to amend paragraph three of the complaint to provide:

> Commencing in 2005 and continuing through November 2008, Charging Party exercised rights guaranteed by the Meyers-Milias-Brown Act by serving as a negotiator, employee representative, and elected official of the exclusive representative for his bargaining unit, Employees Association, AFSCME Local 101.

Respondent requested additional time to prepare for the formal hearing. Both the request for amendment and postponement were granted. The hearing was continued to March 21, 22 and 23, 2011 and formal hearing was held on those days. The matter was submitted for proposed decision on May 31, 2011.

FINDINGS OF FACT

Jurisdiction

The District is a public agency under MMBA section 3501(c) and PERB Regulation 32016(a). Under PERB Regulation 32016(b), Employees Association (EA) is the exclusive representative of an appropriate unit within the District, which includes the classification of Environmental Planner II (Planner II) and Senior Environmental Planner (Senior Planner). Coleman was a public employee under MMBA section 3501(d).

The District and Capital Program Services Branch

The District is divided into four branches: Watershed Operations, Water Utility Enterprise, Capital Program Services and Administration. Capital Program Services is headed by Chief Operating Officer Nai Hsueh (Hsueh).[2] Included within Capital Program Services is

[2] Hsueh has been the Chief Operating Officer with Capital Program Services since August 2006, but she became the Deputy Operating Officer of that same division since 2001, reporting directly to the District's Chief Executive Officer (CEO).

the Capital Program Services Division (CPSD). The CPSD Deputy Operating Officer was Dave Chesterman (Chesterman) and the Assistant Operating Officers were Katherine Oven (Oven) and Mike Hamer (Hamer). Within CPSD is the Environmental Planning Unit (EPU) which is managed by Debra Caldon (Caldon). The EPU contains one Senior Planner, Dave Dunlap (Dunlap), and five to six Planner II's, including Coleman. Coleman managed the environmental clearances for projects which were managed by CPSD, such as the Alviso Slough Restoration Project.

Since the Senior Planner classification was approved, Dunlap was hired as the first Senior Planner and performed lead functions over other planners. In July 2005, Bill Smith (Smith) was hired as the Senior Planner for Watershed Operations and Terry Neudorf (Neudorf) as the Senior Planner for Water Utility Operations. Both Smith and Neudorf did not supervise or act as a lead over other planners.

Coleman began his employment with the District in July 2002 as a Planner II. Before working for the District, he was employed with the California Department of Water Resources (DWR) beginning in 2001 as an Environmental Scientist IV where he was the Delta Area coordinator of the Ecosystem Restoration Division. Before DWR, he was employed with the Otay Water District (San Diego County) for six years and in charge of the entire environmental program.

Coleman's Involvement in EA Bargaining and Elected Offices

Coleman became an EA member when he began District employment. In 2004 and 2005, with the permission of EA President Glenna Brambill (Brambill), he started an EA subcommittee to represent the interest of professional and scientific employees within EA.

Coleman also served as the EA's Vice-President of Outreach[3] between the years of December 2006 and December 2008.

During 2005 and 2006, Coleman was one of seven EA bargaining team members along with two other employee organizations (Engineering Society and Mid-Management Association) and the District involved in interest-based bargaining. The negotiations led to a five-year Memorandum of Understanding (MOU) with a term between December 30, 2006 and December 31, 2011. During the negotiations, Coleman took specific interest in improving career ladder steps for classifications, such as Planner II, as he believed the classifications needed to have more steps or ranges in the salary structure. The MOU included provisions for a classification study pilot in which the District would review and monitor specific classifications, including Planners, in order to determine how the District could retain current staff and recruit competitively with other public agencies. The MOU also included a new reclassification study process where employees whose duties had changed over a period of six months could request a reclassification study to be conducted to determine if their position should be reclassified, whether to a higher or lower classification. If the position was reclassified upward, the employee occupying that position could realize an increase in salary.

Hamer was on the District's negotiating team the same time as Coleman.[4] Hamer characterized Coleman as an effective EA representative who had a strong interest in career development and ladder steps. The District shared Coleman's interest. Hamer characterized

[3] The EA Vice-President of Outreach arranges for social and other union functions. He provides a program of political education to the membership, encourages members to vote, and recommends political positions.

[4] Hamer previously negotiated for one of the employee organizations, when he was its president.

the District's primary issue at the negotiating table at that time was its unfunded liability and rising health care costs, in which the District was able to secure concessions.

A joint management-labor Classification Committee (Classification Committee) was created by the MOU in which District Human Resources Classification and Compensation Unit (CCU) Program Administrator Frank David (David) and Coleman were appointed on behalf of their respective constituents. David and Coleman developed a good working relationship.

Class Specifications for Planner II and Senior Planner

In March 2005, the District's Chief Administrative Officer (CAO) approved the class specification for Planner I/II and Senior Planner. The Planner II specification provides in pertinent part:

> **DEFINITION**
>
> To perform complex and difficult environmental planning work related to the development and implementation of mitigation projects; to coordinate and prepare environmental documents; to evaluate and report on the environmental impact of District projects; and to perform a variety of professional duties relative to assigned area of responsibility.
>
> **DISTINGUISHING CHARACTERISTICS**
>
> **Environmental Planner II**
>
> This is the journey level class within the Environmental Planner series. Employees within this class are distinguished from the Environmental Planner I by the performance of the full range of duties as assigned. Employees at this level receive only occasional instruction or assistance as new or unusual situations arise, and are fully aware of the operating procedures and policies of the work unit.
>
> **SUPERVISION RECEIVED AND EXERCISED**
>
> **Environmental Planner II**
>
> Receives direction from assigned supervisory or management personnel.

May exercise occasional technical and functional supervision over professional staff.

(Emphasis added.)

The class specification for Senior Planner provides in pertinent part:

DEFINITION

To lead, oversee, and participate in the more complex and difficult work of staff related to environmental planning issues, such as coordinating and preparing environmental documents; developing and implementing mitigation projects; natural resources management, habitat restoration, conservation and planning activities; and to perform other related duties as required.

DISTINGUISHING CHARACTERISTICS

This is the advanced journey level class in the Environmental Planner series. Positions at this level are distinguished from other classes within the series by the level of responsibility assumed and the level of complexity of duties assigned.[5] Employees perform the most difficult and responsible types of duties assigned to classes within this series and exercise functional and/or technical supervision over lower level staff, including but not limited to environmental planners and consultants. Employees at this level are required to be fully trained in all procedures related to assigned area of responsibility.

SUPERVISION RECEIVED AND EXERCISED

Receives general direction from assigned supervisory or management personnel.

Exercises functional and/or technical supervision over lower level staff, including but not limited to environmental planners and consultants.

[5] David who wrote the classification specification for Senior Planner stated the specification required the employee to meet a "two-part test" of performing the more complex types of planner duties "and" acting as a lead over other planners. Caldon, who was also involved in providing input for the proposed specification, wanted there to be two types of Senior Planner: a "complexity" or technical Senior Planner "or" a lead Senior Planner. Caldon did not prevail and the adopted specification required the Senior Planner to perform both complex "and" lead duties.

ESSENTIAL FUNCTION STATEMENTS

1. Lead, plan, train and review the work of staff responsible for performing professional environmental planning work related to the preparation of environmental documents and the development and implementation of mitigation documents.

(Emphasis added.)

Temporary Appointment to Project Manager Position

Shortly before March 2006, Coleman and Caldon approached Hsueh and Oven and asked whether Hsueh could temporarily appoint Coleman to a Project Manager position in order that Coleman could gain experience. Hsueh and Oven agreed. On March 1, 2006, Coleman was temporarily appointed to a Project Manager position for a 12-month period[6] to oversee the planning phase of the Alviso Slough Restoration Project.[7] As a result, Coleman received a pay increase at two steps above his Planner II salary. Along with his Project Manager position, Coleman would also perform his Planner II duties on the project. Coleman still reported to Caldon, but as to the project, he reported to Senior Project Manager Bal Ganjoo and Oven. Coleman was allowed to stay in the bargaining unit. The appointment was approved by both Chesterman and Hsueh. The temporary promotion was renewed for another year by Chesterman and Hsueh in March 2007.

In March 2007, Coleman discovered that CPSD was issuing a Request for Proposal (RFP) for the District to contract with private consultants to perform the same planner duties as performed by bargaining unit planners. On March 13, 2007, Brambill issued an informal

[6] The MOU only allows temporary promotions for a period not to exceed 12 months and can only be renewed once. The District cannot use a temporary promotion as a means of filling a position that requires a full-time employee.

[7] The Alviso Slough Restoration Project was viewed as requiring moderate to complex planning work. CEO Beau Goldie (Goldie), who at the time was the "owner" of the project, rated the job as "eight out of ten" in complexity.

memo to District Human Resources Officer Alan Triplett (Triplett) who set up a meeting to discuss the matter.[8] On March 27, 2007, Coleman, Brambill, Triplett and Chesterman met. At the meeting, Coleman advocated that contracting out planner work violated the MOU and Chesterman advocated otherwise. Chesterman decided to go forward with the RFP. On April 27, 2007, Coleman prepared a draft grievance and grievance memo for Brambill to issue, if she needed. The grievance was directed against Chesterman and Oven as violating the MOU by not providing advance notice to EA. It is unknown whether the grievance was actually filed. As of May 11, 2007, the District continued to proceed with the RFP, but the matter was later dropped as to planning work.

In January 2008, Caldon sent out a survey as to the performance of project managers working under her supervision. Oven returned the survey rating Coleman as "needs improvement" in almost every category. Specifically, Oven downgraded Coleman for his grammatical mistakes, poor writing skills, poor preparation of environmental review reports and requesting compensation time off when he needed to work overtime. Caldon historically rated Coleman's performance as exceeds expectations. Caldon did not incorporate Oven's comments into Coleman's evaluation.

On May 6, 2008, Coleman filed a request for administrative reassignment with Debra Dake (Dake) of the District's Equal Opportunity Program pursuant to a MOU section based upon Oven's alleged mistreatment and evaluation of him.

[8] Article XIV Grievance Procedure of the MOU provides for an informal procedure which provides for an informal meeting between the grievant, bargaining unit representative and the supervisor/manager.

Reclassification Process

As stated earlier, in 2008, pursuant to the MOU and the procedure created by it, the District had a reclassification process which allowed an employee, a middle manager, a bargaining unit representative or an appointing authority to request that a reclassification study (desk audit) be conducted on an employee's duties to determine whether those duties still fell within the employee's current classification.[9]

The procedure for an employee-initiated request for reclassification began with the employee filing a request for reclassification and a position description questionnaire either during the months of April or September. The request stated those areas in which the employee was working out-of-class. Another position description questionnaire was completed by the unit manager or supervisor. Both documents were then forwarded to David, who together with CCU analysts Jordan Mendoza (Mendoza) and Pruitt Tully (Tully), determined whether a study should be conducted. Most of the studies over the years were assigned to David.[10]

The District has the option of hiring a private consultant to conduct the study rather than CCU staff, especially if the situation was sensitive or a conflict of interest arose within the CCU staff. The decision to hire a consultant is ultimately the decision of the District Human Resources Deputy Administrative Officer Jose Peralez (Peralez). The District is not bound by the consultant's report, but it aids the District in arriving at a fair determination consistent with the District's classification and compensation plans.

[9] This reclassification process has been rarely used to reclassify one's position to a lower classification.

[10] David has been the CCU program administrator since May 2001.

After the study is conducted, a formal report is prepared by CCU staff. The report determines whether the employee is performing the duties of the employee's current classification.[11] If the study reveals that the work performed is not within the current classification, the procedure provides:

> [T]he next step is to see if there is an existing class that is appropriate in light of the duties, responsibilities and qualifications required for the position. Lastly, if there is no existing class that is appropriate, a new class must be proposed. The analytical process and report will provide an analysis and explanation as to why the existing class is appropriate, or why a different existing class is appropriate, or why neither is appropriate. . . . In addressing these questions, the standard is the class specification for the class(es) in question, taking into account the preponderance of duties of the position.

(Emphasis added.)

After the CCU staff/consultant recommends whether there should or should not be a classification change, the report is forwarded to Peralez. Peralez recommends and/or comments on the report and consults with other managers about removing some or all of the out-of-class duties, if any. Those recommendations are then forwarded to the District's CAO Sharon Judkins (Judkins), who approves, disapproves or amends the recommendations. The CAO can seek input from the respective appointing authority in making her decision. The CAO issues the final decision.

Pursuant to a sideletter of the MOU, after the CAO makes her decision, the employee has the right to grieve/appeal her decision within 15 working days to the CAO.[12] That

[11] The District's Standard Operating Procedure explains that when analyzing the classification of the position, only the current duties performed should be analyzed. Past, future and proposed duties are irrelevant.

[12] Strangely enough, this truncated grievance process, where the employee could grieve a reclassification denial directly to step three (the CAO), was negotiated in a June 2007 sideletter agreement which Coleman was directly involved in.

grievance/appeal includes an appeal hearing with the CAO. The CAO then issues a written appeals decision. The employee may appeal the CAO's decision to arbitration within 15 working days of the receipt of the decision.

Coleman's Request for Reclassification

On April 7, 2008, Coleman filed a request for a classification study to be conducted upgrading him from a Planner II to a Senior Planner. In his position description questionnaire, Coleman explained:

> The Senor [sic] Environmental Planner Class is the only class within the EA bargaining unit that best fits my current and future workload and workplan. I have be[e]n and I am working far beyond journey level environmental planner work. There is no end in sight for the Alviso Slough Restoration Project. This remains the highest priority for the Board, and there are several years of remaining work on this project as we move from planning, to CEQA Board Approval, and complex project management of mitigation and avoidance of impacts during implementation/construction.
>
> I am currently managing a complex Senior level project known as the Alviso Slough Restoration Project, a high priority major District project. I perform specialized complex professional services and strategic planning for [CPSD], working at the direction of the Senior Project Manager. I participate in project initiation (I formed the base RFP for original consulting work, sat on the oral board, negotiated the contract costs with the consultant and work PM[13] to consultant PM on this project[].] I often lead strategic environmental planning, contract changes, run and direct the outside Recreation and Fisheries Scientific Panels, participate in quality management review and perform a variety of professional tasks relative to my assigned area of responsibility. I exercise technical supervision over assigned project management staff (project coordinator, project engineer, project biologists and large consultant team), and I review and approve monthly billings from the consultant. I write draft staff memo's (boating grants), etc. I direct the Consultant Project Manager project efforts on the planning and CEQA work daily, to assure the District receives a good work product that meets our needs.

[13] Project manager.

On June 9, 2008, as part of the reclassification process, Caldon also completed a position description questionnaire and was generally supportive of the reclassification.[14] The questionnaire asked whether she believed Coleman was working out-of-class to which Caldon responded:

> This is a tougher question[.] I believe that the current classification scheme does not well-describe any of the [Environmental Planners] or [Senior Environmental Planners] duties so probably all my staff are work[ing] extro-class. Mike's current duties align with those listed in the [Senior Environmental Planner], although he does not formally serve as a technical lead or in a supervisory capacity.

(Emphasis added.)

In the questionnaire, Caldon admitted that she had a Senior Planner in EPU, who served as the lead planner.

Consultant Assigned to Conduct Reclassification Study

The request and position description questionnaires were forwarded to CCU. David, Mendoza and Tully believed they needed to request a consultant prepare the report, as David and Coleman were on the Classification Committee together and had a good working relationship. They were concerned they would be perceived as biased toward Coleman. The CCU staff informally discussed some candidates to be hired and they recommended to Peralez that Richard Estevez (Estevez) be hired, especially as Estevez had worked previously for the District years earlier. Peralez agreed with the recommendation and hired Estevez. David became the sole District liaison with Estevez as to his duties and deadlines. As part of the assignment, Estevez interviewed Coleman on July 8, 2008 and Caldon on July 15, 2008.

[14] Judkins explained that it was common for a requestor's supervisor to support a reclassification request, especially if the supervisor believed that was the only way to get the work completed.

On July 18, 2008, Estevez issued his report to David. The report cited extensively his interview with Caldon:

> According to Ms. Caldon, the incumbent's current assignments necessitate expert level knowledge of multi-objective planning principles and extensive experience with stakeholder processes that address conflicting resource issues and that exceed the duties specified in his current classification. The major duties the incumbent performs are most critical and exceed the scope of his Planner II position include:
>
> . . . . . .
>
> These duties differ from the Environmental Planner II in that, as a project manager of environmental projects, these are "more highly visible, political and controversial and require a higher level of experience to address the complex nature of the project as well as the jurisdictional landscape." Mr. Coleman[] leads multi-disciplinary teams performing the duties described in the Senior Environmental Planner specification. He directs the training of project staff, negotiates environmental contracts with consultants and outside agencies, monitors the budgets and approves the consultant expenditures. He exercises technical supervision over the Planner II,[15] project coordinator, project engineer, biologists and directs the activities of outside consultants. Ms. Caldon verified that he "leads, oversees, and participates in the more complex and difficult work of staff related to environmental planning issues, such as coordinating and preparing environmental documents; developing and implementing mitigation projects; natural resources management, habitat restoration, conservation and planning activities."

(Emphasis added.)

Subsequent to his finding of fact, Estevez recommended that Coleman be reclassified as a Senior Planner. Noticeably missing from any part of Estevez' report was any analysis as to whether Coleman was a lead over other planners.

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[15] Coleman was the Planner II assigned to the project, unless Caldon was referring to a consultant planner. Coleman's own questionnaire states that he supervised a project coordinator, assistant civil engineer, project biologist and two fisheries biologists. No mention was made of supervising another planner.

Pursuant to the issuance of the July 18, 2008 report, David forwarded the report through its standard routing, which included forwarding it to the appointing authority, Hsueh.[16] Hsueh read the report and strenuously disagreed with it. She was concerned with the accuracy of the description of Coleman's current duties[17] including whether he "exercise[d] technical supervision over the Planner II" and was dismayed that she was not interviewed. She made multiple hand-written comments in the margin of the report stating her disagreements in the hope they would be forwarded to the consultant for further evaluation.

At the time Hsueh reviewed Estevez' report, she was unaware that Coleman was involved in a complaint/meeting about CPSD contracting out planner duties. She did not even recall whether there was a complaint about the issue. Hsueh was also unaware that Coleman was involved in negotiating on behalf of EA or that he was the EA Vice-President of Outreach.

David and Angelica Cruz (Cruz), David's supervisor, interviewed Hsueh regarding her hand-written comments on Estevez report. Cruz, who was a new supervisor, thought that Hsueh inferred that the consultant's report should be rewritten based upon her comments. David did not have that understanding,[18] and never instructed Estevez to rewrite this report.

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[16] The appointing authority is a District managerial employee with responsibility to hire, fire and make other administrative or strategic decisions over a large area of the District's operation. While the designation of appointing authority has shifted over time, in 2008, Chesterman was the CPSD appointing authority, but because he was on leave from work, Hsueh assumed his appointing authority duties.

[17] While Hsueh was not familiar with the details of Coleman's day-to-day duties, she gained her understanding from Oven who gave her project status updates on the progress of the Alviso Slough Restoration Project.

[18] It is unclear when this interview took place. However, on September 4, 2008, David typed out Hsueh's hand-written comments and then remarked whether he agreed or disagreed with her comments. In some cases, he agreed and on others, he disagreed. David noted that not all of the Senior Planners for the District had lead responsibilities, such as Smith and Neudorf who were "'complexity' seniors."

On August 15, 2008, Estevez re-interviewed Caldon. He prepared another report and sent it to David by an email attachment.[19] The format is similar to the first report with similar paragraphs. The report does not track Hsueh comments, but provides more detail from Caldon as to the description of Coleman's duties as advanced journey level work. Subsequent to this factual expansion, Estevez states the Senior Planner specification requires the incumbent to be a lead over other planners and that Coleman's duties did not require him to be a lead over other planners and therefore Coleman is appropriately classified as a Planner II.

On August 19, 2008, Cruz gave Peralez a weekly update concerning various CCU issues, including her understanding that Hsueh wanted Estevez' report rewritten. On August 20, 2008, Peralez replied:

> One item caught my attention. The Mike Coleman study was done by an outside consultant to provide an objective third party analysis and recommendation. It is not appropriate for an Appointing Authority to direct the rewriting of the consultant's report and such a request should not have been approved [b]y staff including Rudy [Medina][20] so that direction is hereby countermanded.
>
> Please do not circulate the new report.
>
> I believe the proper role of the Appointing Authority is to review, comment and concur or not concur. All of [Hsueh's] comments are appropriate in that manner and should be included.
>
> We do not have to agree with the consultant's findings but we do need to document our reasons since the process is subject to arbitration.
>
> I have copied [Judkins] to inform her of my direction.

[19] The date of the second report is extremely problematic. The document is undated and the most recent date of interview listed on the report was that of Caldon on August 15, 2008.

[20] Rudy Medina was a Human Resources manager who reported to Peralez.

David received a copy of Peralez' directive and never printed Estevez' second report or showed it to anyone because of the directive.

On August 28, 2008, David issued a memo[21] to Peralez and CAO Judkins to be accompanied with Estevez' report. When a consultant was hired to prepare the report, David was to prepare a simple introductory cover memo and analyze the consultant's report to insure that the report did not go "outside any gross boundaries." David made the following comments:

> **RECOMMENDATION**
>
> I have read the consultant's report and attest that the study and analysis reasonably meet the District's classification standards and principles. Accordingly[,] I find no cause not to adopt the consultant's findings and recommendation.
>
> **OTHER MANAGEMENT CONSIDERATIONS**
>
> The class [specification] mentions that the Senior is a lead. I am not sure that [Coleman] meets the District's complete definition of lead: He does not lead a section/team of planners. However, management created three[22] other senior planners that also do not meet the full definition. The staffing practice differs from the [specification].

(Emphasis added.)

[21] The August 28, 2008 memo states it is the third version. David explained it had gone through a number of revisions with minor grammatical corrections. The document also has a date stamp of September 10, 2008 on it, but that date could not be its final issuance as Judkins signed off on the memo on September 8, 2010.

[22] David is most likely in error when he states there were "three" Senior Planners who did not meet the full definition in the specification as Dunlap performed the lead duties.

Elevation of Reclassification Study to Judkins

Judkins has been the District's CAO over Human Resources since April 2008.[23] The CAO has oversight over Human Resources and was involved in labor negotiations, but she did not sit at any of the bargaining tables. When Judkins was the District's CAO, she initially only had interactions with the presidents of the exclusive representatives and later had interaction with some of the vice-presidents. She did not know that Coleman was the EA Vice-President of Outreach. Judkins did not become aware of EA negotiation issues until April 2008 when she was the District's CAO. She became unaware of Coleman's role in bargaining for EA in September 2008 and early December 2009.[24]

The April 2008 batch of reclassification requests were the first that Judkins reviewed as the CAO. When she became CAO, she started the practice of removing out-of-class duties from employees requesting reclassification rather than granting the reclassification request. Judkins was not limited to either granting the reclassification if work was completed out-of-class or denying the reclassification if it was not. She focused on what was the District's best business decision. Such business decision may mean removing duties which were out-of-class, transferring duties to another unit or even deciding those duties should not be performed at all. While she did not think it to be the District's best business decision to reclassify an employee, she did not think it was fair to continue to allow them to perform out-of-class duties either.

[23] Judkins began employment with the District in 2000 and left employment in 2002. She returned to the District in September 2006 as the District's Emergency Services manager. She then promoted as the Deputy Administrative Officer over Emergency Services, Finance, Procure and the Warehouse. From December 2008 through June 2009, Judkins was appointed as the District's Interim Chief Executive Officer.

[24] Coleman was involved in EA bargaining from 2005 to 2006 when Judkins was either not employed with the District or did not serve in a position which had involvement with negotiations. When Judkins returned in September 2006, the labor negotiations had been concluded resulting in a five-year agreement.

Judkins received David's August 28, 2008 cover letter with the consultant's report. On September 8, 2008, Judkins checked the box[25] "Approve recommendation(s) as amended" and commented in a section entitled, "Amended Action and Justification:"

> Due to the documented disagreement between the Manager [Caldon] and the area's Appointing Authority [Hsueh], the two should agree on work being performed outside of class and have such work removed immediately. Therefore[,] I am denying the recommendations.

(Emphasis added.)

Judkins characterizes her September 8, 2008 comments as a "denial" of Coleman's request to reclassify. She was not able to determine if Coleman was performing duties outside the Planner II classification, but wanted to determine those duties so they would be immediately removed. In making her decision, Judkins relied primarily on David's summary of Estevez' report and she did not review the details of Estevez' report or the reconsideration request/position description questionnaires.[26] Judkins also spoke with Hsueh and read her comments on Estevez' report, but did not speak with Oven or Chesterman.

Judkins met with David and Cruz after issuing her denial. David, Cruz and the consultant were to conduct interviews to identify which of Coleman's duties were out-of-class and address Hsueh's comments. The reclassification request was denied, but she wanted them to discover the out-of-class duties and remove them.

After speaking with Judkins, David contacted Estevez and told him that the assignment was not complete and the District needed to address a discrepancy regarding the description of

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[25] There were only two boxes on this form for Judkins to check: "Approve recommendation(s) as submitted" and "Approve recommendation(s) as amended." Strangely enough, a box did not exist for denying the recommendation.

[26] Judkins explained that at this level of determination she relies on staff's report, but when the matter is appealed, she looks at the appeal and the underlying documents.

Coleman's duties between what Estevez reported and Hsueh's comments and whether Coleman truly acted as a lead. Estevez was to conduct another interview of Caldon.

David interviewed Hsueh, Caldon and Chesterman to discuss the accuracy of the consultant's report as to Coleman's current duties and whether Coleman was a lead over other planners. All three interviewees confirmed that David was not a lead over other planners.

On November 7, 2008, David issued another report regarding the reclassification study performed on Coleman's position which provided.

> Based on the comments submitted by [Hsueh], [Judkins] directed classification staff to follow up and investigate her concerns. The following was done:
>
> 1. The consultant was directed to re-interview the unit manager/supervisor
> 2. Staff interviewed Debra Caldon
> 3. Staff interviewed Nai Hsueh
> 4. Staff interviewed Dave Chesterman
> 5. Staff reviewed the class [specification] for Senior Environmental Planner
>
> Based on this follow-up, staff concludes the class [specification] defines the Senior as a lead. The incumbent does not meet the District's complete definition of lead: [t]he duties do not include any functional supervision responsibilities over other planners. The Division management [is] in consensus that the incumbent is not a lead planner, as the [specification] defines it.

(Emphasis added.)

Peralez, Chesterman and Judkins all concurred with the staff report. Peralez considered the consultant's first report to be flawed and Chesterman referred to Hsueh's written comments.

On or about November 7, 2008, David sent a notification to Coleman that he was working within the scope of his current classification and that a reclassification could not be supported. He was notified of his appeal rights pursuant to the MOU and the deadline for filing such appeal.

Coleman's Appeal

Subsequent to Coleman's reclassification denial, he sent a November 10, 2008 email to David and copied Chesterman and Judkins. The email stated in pertinent part:

> I will immediately work with EA to file an appeal and to file a further grievance and ethics issue. I see this as a clear retaliatory action by [Hsueh], who does not like my boss, and makes statements in the attachments to basically say all environmental planning work is the same. . . .
>
> Because I am supported by the Outside Classification Consultant's report that supports my case for reclass, and because I am an official Union Vice President of the Employees Association I will need to immediately cease all work on the Alviso Slough Restoration Project until all appeals and grievances[] on this project are complete, as I cannot condone the working out of class. This work will need to be reassigned to another Senior Environmental Planner at the District, otherwise I will be required by EA to file a grievance if the District knowingly assigns this work out of class to EP II's or engineers.
>
> As a Vice President of EA and head of political outreach, I often meet with the District Board members. Director Santos loves the work I have completed on the complex work of Alviso, as does the Community, and I can't imagine he is going to be too happy about this kind of treatment of staff. You cannot separate out complex environmental work on Alviso and determine that it is simple and can be done by anyone.
>
> In conclusion, I am disappointed that management has drawn this case out so long, and why a district officer [Hsueh] multiple levels above my job, that has no involvement of my work, would go out of her way to kill this reclass on her way out the door to retirement.

The email was eventually forwarded to Goldie. Goldie inquired of Chesterman and Oven whether there would be a delay in the project based upon Coleman's email. On November 12, 2008, Chesterman replied that there would not. Chesterman also contacted Coleman and informed him that it would be premature to reassign him until his appeal had been determined. Chesterman also stated that his work had not been determined to be Senior Planner work. Hsueh received a copy of Chesterman's email.

On December 2, 2008, Coleman filed his appeal from the denial of the reclassification with Judkins. In his appeal, Coleman briefly stated that he suffered retaliation by CPSD Officers based on their dislike of Caldon, himself and his protected union activities. He included numerous attachments including the original reclassification request and Estevez' report. The attachments focused on the complexity of his duties that he performed at a Senior Planner level and stated that he lead other planners by virtue of his vast project experience. Not until Judkins read the appeal, did she know that Coleman had any involvement with EA. Judkins read all documents related to the appeal prior to rendering a decision.

On January 6, 2009, Coleman, with a union representative, met with Judkins for his reclassification appeal hearing. On January 16, 2009, Judkins issued her decision regarding his appeal which provided in pertinent part:

> **FINDINGS**
>
> You were advised of three specific areas that needed to be addressed for your reclassification to be supported: Definitions, Distinguishing Characteristics and Supervision received and exercised.
>
> *Definition*: The Senior Environmental Planner class specification states, in part, ***"lead, oversee and participate in the more complex and difficult work of staff related to environmental planning issues. . ."***. Although it is understood that the level of work you perform is complex and difficult, the work you articulated does not meet the standard of "more complex" or at a higher level than other Environmental Planner I/II's at the District. The assessment of your position included validating the work you are doing compared to work being done by Senior Environmental Planners at the District. The results of that assessment confirmed the original decision that you are properly classified as an Environmental Planner II. Also, although you stated that you lead and/or oversee relationships with outside consultants, you have not been assigned any supervisory or lead duties over any other District employees. The information you provided during the appeal does not support a deviation from the

classification specification of Environmental Planner II as your current duties fall within this specification.

Distinguishing Characteristics: The key distinguishing characteristic between the Senior Environmental Planner and Environmental Planner II is the functional and/or technical supervision over lower level staff. As referenced in the "Definitions" paragraph above, you have not been assigned any supervisory or lead duties over any other District employees. . . .

Supervision Received and Exercised: The Environmental Planner II class specification states ***"May exercise occasional technical and functional supervision over professional staff."*** This definition supports the level of supervision that you provide and therefore, the Environmental Planner II specification is the appropriate classification.

DECISION

Based on my findings, as set forth above, I have determined the position of Environmental Planner II most closely reflects the job duties you described and is the appropriate classification for work you currently perform. . . .

(Emphasis included in original.)

Judkins explained that Coleman did not provide her any additional information in his appeal or appeals hearing which demonstrated that he was performing duties outside that of a Planner II. She did not consult with Hsueh, Chesterman or Oven during the appeal stage of the reclassification proceedings.

At no time since Judkins issued her September 8, 2008 denial, did she become aware of any of Coleman's duties being removed and she did not follow-up on it, as it was not brought to her attention after her appeals decision. She also did not speak to any other managers about downward classifying any other Senior Planners who did not supervise other Planner II's. His duties under the Alviso Slough Restoration Project continued for a number of months as is.

David has conducted over 500 to 600 of these reclassification studies. His opinion was that Coleman should not be reclassified. During the April 2008 reclassification request

window, CCU was assigned to conduct 20 or more reclassification studies, including Coleman. Judkins only granted two of the 20 reclassification requests. Three to four of these studies were outsourced to consultant(s).

On January 30, 2009, Aldrich sent a letter to AFSCME Business Representative Ferrero requesting that EA arbitrate Judkins' decision. Aldrich stated that Coleman was not willing to fund the arbitration, but would be relying upon EA's financial resources.[27] On February 27, 2009, EA notified Coleman that it would request arbitration on his behalf to meet the arbitration timelines in the MOU. On March 26, 2009, the EA Executive Board voted not to proceed with Coleman's case to arbitration.

ISSUES

1. Was the filing of the charge untimely?

2. Did the District deny Coleman's reclassification request/appeal in retaliation for his exercise of protected rights?

CONCLUSIONS OF LAW

Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party

[27] Article IX, section 3 in the negotiated grievance procedure between EA and the District provides in part:

> The Bargaining Unit or the employee may take a matter to arbitration. If the employee takes a matter to arbitration without Bargaining Unit concurrence the employee will be responsible for all costs associated with the Arbitration.

knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)[28] A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

The date of the denial of Coleman's request for reclassification was September 8, 2008, however, Coleman was not put on notice of the denial until November 7, 2008, when he received the notification of the denial from David. Coleman grieved/appealed that denial on December 2, 2008 and that appeal was denied on January 16, 2009. Coleman filed the charge with PERB on June 4, 2009, which was over six months from the date Coleman was notified that he was initially denied by the District. Specifically, it was filed almost seven months from the initial denial.

Coleman argues that some of this time period, from the time he filed his grievance/appeal on December 2, 2008 until March 26, 2009, when EA denied to proceed to arbitration on his behalf, was tolled by the doctrine of equitable tolling. In *Solano County Fair Association* (2009) PERB Decision No. 2035-M, the Board found the doctrine of equitable tolling as decided in *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach*), to apply to the MMBA. In *Long Beach*, the sixth-month statute of limitations was tolled during the period of time period if: "(1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period

[28] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

by causing surprise or prejudice to the respondent." (*Long Beach, supra,* PERB Decision No. 2002, p. 15.)

The District argues that Coleman could have pursued the grievance to arbitration by paying for the arbitration himself and he therefore abandoned the grievance process short of its conclusion and therefore did not pursue the process "reasonably and in good faith." Coleman did not pursue arbitration as he was going to rely on the financial resources of EA to fund it. His stated justification, based upon financial constraints, cannot be considered to be unreasonable and in bad faith. Additionally, it is clear that his pursuit of his appeal, which was set forth in a negotiated sideletter to the MOU, up to the time EA informed him it would not represent him, was not pursued in bad faith. He hired a private attorney to represent his interest on the matter and his appeal reflects serious effort. Equitable tolling will be granted and his filing with PERB is therefore considered timely.

Retaliation for Protected Activities

To demonstrate a prima facie case that the District retaliated against Coleman in violation of section 3506, he must show that: (1) he exercised rights under MMBA; (2) the District had knowledge of the exercise of those rights; (3) the District took adverse action against Coleman; and (4) the District took the adverse action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S (*DPA*).) Once Coleman has established a prima facie case of retaliation, the burden shifts to the District to show that it would have taken the adverse action even in the absence of his protected activities. (*Novato*; *Wright Line, Inc.* (1980) 251 NLRB 1083.)

1. Protected Activities

MMBA section 3502 provides in pertinent part:

> [P]ublic employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

Coleman's participating on the EA negotiating team, serving as a EA vice-president, participating in an informal grievance meeting to resolve a possible grievance, participating in a joint management-labor Classification Committee created by the MOU, and filing a request for administrative reassignment from Oven's supervision pursuant to an MOU provision all constitute participating in the activities of his employee organization pursuant to MMBA section 3502. Coleman has satisfied the first element of the prima facie case that he exercised protected rights under the MMBA.

2. Knowledge of Protected Activities

a. Denial of Reclassification Request

The District contends that Coleman failed to demonstrate a prima facie case of discrimination because Judkins, the ultimate decision-maker, was unaware of Coleman's protected activities. (*Sacramento City Unified School District* (1985) PERB Decision No. 492.) Judkins' testimony that she was unaware of Coleman's protected EA activities while deciding the reclassification request was consistent with her times of employment, the time the MOU was negotiated and her anticipated dealings with specific union officers and was unrebutted by Coleman. While Judkins was unaware of Coleman's protected activities, unlawful animus may be found where the ultimate decision-maker relied on inaccurate and biased reports of other management officials who knew of the charging party's protected activities pursuant to the subordinate bias liability theory. (*City of Modesto* (2008) PERB Decision No. 1994-M, *State of California (Department of Corrections)* (2001) PERB Decision

No. 1435-S, adopted proposed decision, p. 32 and *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, p. 16).

The only input that Judkins received from a District manager prior to her September 8, 2008 denial of the reclassification request was Hsueh, who was also unaware of Coleman's protected activities. Hsueh's input focused on her comments in reaction to Estevez report: she expressed concern over the accuracy of the description of Coleman's duties and she was not interviewed. The report stated that Coleman exercised technical supervision over the Planner II, which was inaccurate. While Hsueh was not aware of Coleman's duties, she gained an understanding of his duties from Oven. Oven was the focus of Coleman's concerns over outsourcing bargaining unit planning work in March 2007 and Coleman filed a May 7, 2008 request to be administratively reassigned from Oven's supervision pursuant to the MOU, based upon Oven's alleged mistreatment of him.

The fact Coleman did not function as a lead over other Planner II's was not contested by anyone, including Caldon. While Coleman and Caldon contended that other Senior Planners such as Smith and Neudorf were also not leads over other planners, the reclassification procedure specified that in addressing questions of which classification is appropriate for the requestor, it is class specification which is the standard taking into account the preponderance of the duties of that position. The class specification was clear that the Senior Planner must perform the more complex duties "and" act as a lead over other planners. Because of this, Oven provided accurate information as to Coleman's key duty in dispute and therefore, Oven's knowledge of Coleman's protected activity cannot be imputed to Judkins. As such, Coleman failed to demonstrate that Judkins had knowledge of his protected activities. He failed to therefore establish a prima facie case of discrimination as to the denial of the

reclassification request and the allegation that the denial of the reclassification request violated the MMBA is dismissed.

b. Denial of Appeal

Although not specifically plead in the complaint,[29] Judkins had knowledge of some of Coleman's protected activities as he specifically stated in his appeal that he suffered retaliation based on CPSD Officers dislike of his protected activities. Coleman has satisfied the second element of the prima facie case for discrimination that Judkins' had knowledge of his protected activities, before denying his appeal.

3. Adverse Action

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a

[29] The complaint stated the retaliatory act in paragraph 5 to be:

> On or about November 7, 2008, Respondent took adverse action against Charging Party by denying Charging Party's request for reclassification.

While Coleman did not seek to amend the complaint to add Judkins' January 16, 2009 denial of his appeal, Coleman sought to put on the evidence and was allowed to do so near the beginning of the second day of hearing, March 21, 2011, when Coleman was still on the direct examination of his first witness (Coleman). The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must have occurred within the applicable statute of limitations period. (*Ibid.*) These criteria have been satisfied and therefore the January 16, 2009 denial will be evaluated in this proposed decision.

> reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; fn. omitted.)

In *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, the Board concluded that actions resulting in a loss of a promotion constitutes an "adverse action." In the instant case, Judkins' January 16, 2009 denial of his appeal was, in essence, a denial of an appeal for promotion and therefore such a denial constituted an adverse action. The District concedes that Coleman suffered an "adverse action" under the MMBA.

4. Nexus between Protected Activities and Adverse Action

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated,

vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

As the allegation that the denial of the request for reclassification has been dismissed, the only remaining issue is whether the District's conduct during the appeal period, November 7, 2008 through January 16, 2009, showed a necessary connection between Coleman's protected activities and the denial of the appeal. By the time of Judkins' official denial of Coleman's request for reclassification, November 7, 2009, Judkins had denied Coleman's request on September 8, 2008 because she decided to remove whatever out-of-class duties Coleman had, as she had done for so many other requestors. She also agreed with David's November 7, 2008 report that Coleman did not meet the specifications of a Senior Planner as he was not a lead over other planners.

In Coleman's appeal, he continued to emphasize the complexity of his duties and that he acted as a resource to other planners based upon his project experience. He attended an appeals hearing and was represented. Other than the result of the hearing, Coleman did not contend that the procedure of the appeal was deficient.

Coleman contends that the appeal procedure was disparate in that other employees were appointed to the position of Senior Planners without accompanying lead duties, that those Senior Planners who were not leads were not downward classified and that Coleman never had his out-of-class duties removed until many months later.

The argument that other Senior Planners did not have lead duties was raised and rejected in the denial of the request, when Judkins did not know of Coleman's protected activity. Judkins continuance to hold to the specification of the classification even during the appeal or failure to demote other Senior Planners who were not promoted while Judkins was the CAO does not demonstrate an anti-union nexus, but rather consistency with her previous determination where she had not taken action to downward classify Smith and Neudorf. Judkins did not follow-up on the removal of Coleman's duties because it was never brought to her attention and it was never found by her that Coleman performed duties outside of his classification. Overall, Coleman failed to demonstrated an unlawful nexus between his protected activities and the denial of his appeal, and therefore failed to demonstrate a prima facie case of discrimination.

5. "But For" Test

Even assuming that Coleman had demonstrated a prima facie case of discrimination for the denial of the appeal, the District met its burden of establishing that it would have denied Coleman's appeal even in the absence of such protected activity. Judkins remained consistent in her justification of her decision throughout both the denial process and the appeal process. She wanted to remove out-of-class duties, if any, and found that Coleman did not meet the lead requirement of Senior Planner. She granted only two of the twenty requests for reclassification and made a habit of removing out-of-class duties for those who requested reclassification.

Coleman failed to demonstrate by a preponderance of the evidence that his protected activities were a motivating factor in Oven's description of his duties or Judkins' decision to deny his reclassification request/appeal. Even assuming Coleman had met his burden, the District established that it would have taken the same actions even in the absence of such

protected conduct. No violation of MMBA sections 3502.1, 3506 and 3509(b) and PERB Regulation 32603(a) and (g) are therefore found.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CE-663-M, *Michael Coleman v. Santa Clara Valley Water District*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c),)

Shawn P. Cloughesy
Chief Administrative Law Judge